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No. _____

## In the Supreme Court of the United States

October Term 1992

**RICHARD E. GRIFFIN,**
**PETITIONER**

**v.**

**FIRST NATIONAL BANK OF CROSSETT,**
**CROSSETT, ARKANSAS,**
**RESPONDENT**

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF ARKANSAS

## PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

Whether Petitioner's right to a fair, unbiased hearing before an impartial decisionmaker, guaranteed by the Due Process Clause of the Fourteenth Amendment of the Constitution, was violated where the Special Chief Justice of the Arkansas Supreme Court, who had direct and substantial professional and personal interests in reaching a decision in favor of Respondent, participated in the Arkansas appellate proceedings; where the Special Chief Justice declined to recuse in further participation in the proceedings after request by Petitioner; and where the Arkansas Supreme Court rejected Petitioner's request that the court vacate the opinion authored by the Special Chief Justice.

## PARTIES TO THIS CASE

All parties to this Petition before this Court are named in the caption.

Respondent originally commenced this action with the Circuit Court of Ashley County, Arkansas naming four individual defendants therein: Petitioner herein; Lonnie C. Couch of Ashley County, Arkansas; James Young of Ashley County, Arkansas; and Robert B. Cockrum of Ashley County, Arkansas. Messrs. Couch, Young, and Cockrum were not parties to the Respondent's appeal to the Supreme Court of Arkansas and are not parties to this action.

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FIRST NATIONAL BANK OF CROSSETT,
CROSSETT, ARKANSAS,
RESPONDENT

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## PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

Richard E. Griffin, the Petitioner herein, seeks review by this Court upon Writ of Certiorari of the opinion of the Supreme Court of Arkansas dated June 29, 1992, reversing and remanding the August 20, 1990 judgment rendered by the Circuit Court of Ashley County, Arkansas (Honorable Russell Rogers, Circuit Judge on Exchange, presiding); the order of the court below dated September 28, 1992, denying Petitioner's Petition for Rehearing of the June 29, 1992 opinion; the order of that court denying Petitioner's Motion to Suggest Disqualification and to Vacate Opinion; and the order of that court dated November 2, 1992, denying Petitioner's Motion for Disqualification, to Vacate Decisions, and for Resubmission. The rendition of the June 29, 1992 opinion and the subsequent appellate decisions of the Supreme Court of Arkansas denied Petitioner his right to a fair, unbiased hearing of the appeal by an impartial decisionmaker guaranteed by the Due Process Clause of the Fourteenth Amendment.

## OPINIONS BELOW

The majority opinion and the dissenting opinion of Special Justice Jerry Pinson of the Supreme Court of Arkansas of June 29, 1992 are reproduced in App. A, infra, 1a-15a, and are officially reported in 310 Ark. 164, 832 S.W.2d 816 (1992). The dissenting opinion of Justice Tom Glaze of the Supreme Court of Arkansas of June 29, 1992 is reproduced in App. A, infra, 16a-20a officially reported in 310 Ark. 174. (For unknown reasons, the advance sheet for the Southwestern Reporter, 2d Series, did not include the dissenting opinion of Justice Glaze). The orders of the Supreme Court of Arkansas of September 28, 1992 are reproduced in App. B, infra, 21a-22a and are unreported. The order of the Supreme Court of Arkansas of November 2, 1992 is reproduced in App. C, infra, 23a and is unreported. The July 16, 1990 letter decision of the Circuit Court of Ashley County, Arkansas and the subsequent judgment entered on August 20, 1990, are reproduced in App. D, infra, 24a-27a and are unreported.

## JURISDICTION

The June 29, 1992 opinion, the September 28, 1992 orders and the November 2, 1992 orders of the Supreme Court of Arkansas necessarily reject, sub silentio, Petitioner's claim, under the Due Process Clause of the Fourteenth Amendment, that the participation of the Special Chief Justice of that court in the consideration and rendition of the June 29, 1992 opinion and the subsequent appellate proceedings deprived Petitioner of his right to a fair, unbiased consideration by an impartial decisionmaker of the issues presented in the appeal

to the Arkansas court. The June 29, 1992 opinion and the subsequent orders of the Supreme Court of Arkansas are in conflict with controlling decisions handed down by this Court including *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813 (1986) and *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1988), and thus, constitute a decision by a state court of a federal question which conflicts with applicable prior decisions of this Court. Accordingly, this Court has jurisdiction of this case under 28 U.S.C. § 1257(a) and Rule 10.1(c) of the Rules of this Court.

At a minimum, this Petition presents an important question of federal constitutional law which should be settled by this Court. Thus, this Court alternatively has jurisdiction over this Petition under 28 U.S.C. § 1257(a) and Rule 10.1(c) of this Court.

This Petition for Writ of Certiorari is being docketed with this Court within ninety (90) days from the letter order of the Supreme Court of Arkansas handed down on September 28, 1992, denying Petitioner's Petition for Rehearing.

## CONSTITUTIONAL PROVISION INVOLVED

The Due Process Clause of the Fourteenth Amendment of the Constitution of the United States provides, in pertinent part, that:

> "[N]or shall any State deprive any person of . . . property, without due process of Law . . . ."

## STATEMENT OF THE CASE

Petitioner herein contends that he has been deprived of substantial rights guaranteed by the

Due Process Clause of the Fourteenth Amendment of the Constitution of the United States due to the participation of the Special Chief Justice of the Supreme Court of Arkansas in the deliberation of the appeal to that court, particularly in his authoring of the majority opinion. In order to fully demonstrate the substantial nature of the federal question presented, this statement of the case will discuss the facts leading up to the appeal to the Arkansas court, the procedural history of this case before the Arkansas Supreme Court, and the specific facts supporting the requested constitutional disqualification of the Special Chief Justice and the vacation of the June 29, 1992 opinion.

### A. Facts Leading Up to the Appeal to the Supreme Court of Arkansas.

In the early 1980s, Bearhouse, Inc. (Bearhouse), an Arkansas corporation, was formed for the purpose of operating a federally licensed grain warehouse. On May 1, 1986, First National Bank of Crossett, Crossett, Arkansas, Respondent herein, loaned to Bearhouse $490,000 which was to be secured by a first priority mortgage on certain real estate and related improvements owned by Bearhouse. This loan was scheduled to mature on May 1, 1987, and required monthly payments of accrued interest prior to the stated maturity. At the time this loan was made, Richard E. Griffin, Petitioner herein, was a 25% shareholder in Bearhouse. The other three shareholders in Bearhouse, each owning 25% of the outstanding stock, were Robert E. Cockrum, Lonnie C. Couch, and James Young.

As part of the May 1, 1986 loan transaction, Petitioner on April 30, 1986 executed a written

guaranty in favor of Respondent on a pre-printed form prepared by Respondent. The guaranty executed by Petitioner, however, contained an express limitation of Petitioner's liability which was set forth in typewritten language added to the pre-printed form by Respondent. The typewritten language of limitation supplied by Respondent stated "guarantee (sic) limited to 25% outstanding debt." (Emphasis supplied.)

Messrs. Cockrum, Couch, and Young also executed written guaranties in favor of Respondent. The written guaranties executed by Cockrum, Couch, and Young, however, were different from the guaranty executed by Petitioner in one key respect: each of these other guaranties contained a typewritten limitation that "guarantee (sic) limited to 25% of total indebtedness." (Emphasis supplied.) Copies of each of these guaranties are reproduced in App. E, infra, 28a-51a.

On May 1, 1986, Respondent took steps to close the loan transaction with Bearhouse. In closing this loan, the parties (and specifically Petitioner) contemplated that Respondent would obtained validly executed, properly acknowledged, and fully enforceable real estate mortgage on the collateral to be pledged by Bearhouse to secure the loan. However, as discussed below, the mortgage obtained was note property acknowledged.

In early February, 1987, Bearhouse closed its business and ceased operations. Shortly thereafter Bearhouse was placed in an involuntary bankruptcy proceeding and was unable to pay its obligation to Respondent. On May 29, 1987, in order to enforce the mortgage, Respondent filed in the bankruptcy court a motion for relief from automatic stay imposed

by 11 U.S.C. § 362(a) seeking permission to immediately foreclose the real estate mortgage granted to it by Bearhouse. In support of its motion for relief from the automatic stay, Respondent attached a copy of a real estate mortgage from Bearhouse which had an incomplete notary's acknowledgment.

On June 25, 1987, a hearing was held in the bankruptcy court on Respondent's motion for relief from stay. Respondent could not establish the validity of its mortgage at that hearing and its motion was denied. At the hearing, Respondent could not produce a copy of the mortgage which was in all respects properly acknowledged in accordance with Arkansas law. One version of the mortgage produced was a copy of the version originally attached to the Respondent's motion which contained no acknowledgment. A second version of the mortgage, on its face, appeared to be properly acknowledged. However, the testimony offered to prove that the original document had been properly acknowledged showed that the acknowledgment procedure failed to comply with the requirements under Arkansas law.[1] The mortgage had been taken

[1]Ark. Code Ann. § 16-47-101, in pertinent part, provides:

> All deeds and other instruments in writing for the conveyance of any real estate . . . shall be proven or duly acknowledged in conformity with the provisions of this act, before they or any of them shall be admitted to record.

Ark. Code Ann § 16-47-106 in pertinent part, provide:

> (a) The acknowledgment of deeds and instruments of writing for the conveyance of real estate . . . shall be by the grantor appearing in person before a court or officer having the authority to take the acknowledgment . . . .

Ark. Code Ann § 16-47-205, in pertinent part, provides:

> The officer taking the acknowledgment shall know or have satisfactory evidence that the person making the acknowledgment is the person described in and who executed the instrument.

to the offices of Bearhouse by one of Respondent's bank officers where Lonnie Couch signed the document in his capacity as president of Bearhouse. Thereafter, the bank officer returned the mortgage back to the bank where an employee of Respondent, Donna Elaine Rice, acknowledged the mortgage. Ms. Rice testified that she did not personally witness Mr. Couch's signing of the mortgage nor was she personally acquainted with Mr. Couch. Further, Ms. Rice testified that she did not verify Mr. Couch's signing of the document by telephone.

At the conclusion of the bankruptcy hearing, Bankruptcy Judge James G. Mixon denied Respondent's motion for relief from stay because of the existence of a genuine issue as to the validity and enforceability of the mortgage. Judge Mixon further ordered Bearhouse's bankruptcy trustee to promptly sell the mortgaged property but denied Respondent the right to offset bid its debt at the sale.

On July 13, 1987, Respondent filed suit in the Circuit Court of Ashley County, Arkansas against Petitioner and co-guarantors Cockrum, Couch, and Young. In response to the suit, Petitioner asserted various affirmative defenses alleging, inter alia, that Respondent had impaired the collateral which was intended to secure the Bearhouse indebtedness thereby discharging Petitioner of his liability on the guaranty. Additionally, Petitioner filed a counterclaim against Respondent, inter alia, stating causes of action against Respondent for negligence and misrepresentation. In essence, Petitioner contended that Respondent's actions in not obtaining a properly notarized mortgage and in not properly and timely liquidating the collateral pledged to it

by Bearhouse caused Petitioner direct injury and damage in the form of increased, unanticipated and unnecessary liability under his guaranty.

At the trial of this matter, Petitioner prosecuted his counterclaim requesting the trial court to render a declaratory judgment in his favor of no or limited liability. Petitioner contended that three separate sets of actions on Respondent's part supported his counterclaim and his defenses: (1) Respondent's failure to obtain a properly notarized mortgage at the time the Bearhouse loan was funded; (2) Respondent's negligent handling of the motion for relief from stay proceedings in connection with the Bearhouse bankruptcy proceedings; and (3) Respondent's actions which resulted in the Bearhouse trustee in bankruptcy delaying the sale of the mortgaged property for almost three years even though the bankruptcy court, on June 25, 1987, had ordered on the mortgaged property promptly sold at public auction.

At the trial, Petitioner adduced evidence that Respondent's expert witness at the June 25, 1987 bankruptcy hearing had valued the mortgaged property at a minimum of $450,000 and that the total debt owed to Respondent on that date was slightly less than $510,000. The evidence adduced further established that Respondent's attorney and one of Respondent's officers had privately contacted Bearhouse's trustee in bankruptcy shortly after the June 25, 1987 hearing and had prevailed upon the trustee to delay the sale of the mortgaged property until the issues relating to the validity of Respondent's mortgage were finally resolved by the bankruptcy court. It was further established that when the litigation relating to the mortgage validity

was finally resolved and the mortgaged property was ultimately sold, Respondent purchased the property for an offset bid of $140,000.

Based upon the evidence adduced at trial, including evidence presented by Petitioner in support of his counterclaim, the trial court rendered a judgment of limited liability against Petitioner in the total amount of $17,000 plus interest from date of default.[2] This $17,000 judgment was a judgment in Petitioner's favor declaring him to have only limited liability under the guaranty agreement.

Subsequently, Respondent appealed the entry of the $17,000 judgment to the Supreme Court of Arkansas. In support of its appeal, Respondent contended that the trial court had erred by admitting parol evidence to interpret the typewritten language of the guaranty agreement, that the trial court had erred in finding that the impairment of collateral defense applied, and that the trial court had erred in failing to award Respondent an attorney's fee.

### B. Procedural History of Appeal to Supreme Court of Arkansas.

On August 28, 1990, Respondent filed its Notice of Appeal to the Arkansas Supreme Court requesting review of the August 20, 1990 judgment. The record from the trial court was filed with the Arkansas court on March 19, 1991. Subsequently thereafter, Respondent and Petitioner filed their respective briefs with the court. On April 13, 1991, the cause was orally argued to the Arkansas court by counsel for the parties.

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[2] The $17,000 judgment roughly equals 25% of the difference between the amount owed to the Respondent at the time of the June 25, 1987 bankruptcy hearing and the minimum value ascribed to the mortgaged property at the same hearing (i.e., $510,000 debt less $450,000 value equals $60,000. 25% of $60,000 equals $15,000).

On June 29, 1992, the Supreme Court of Arkansas entered its opinion reversing the trial court's decision. Two justices of the Arkansas court dissented from the opinion. On July 16, 1992, Petitioner filed with the Arkansas court his Petition for Rehearing addressing several substantive issues.

On August 24, 1992, after learning of and verifying certain facts through a brief but necessary investigation, Petitioner filed with the Arkansas court his Motion to Suggest Disqualification and to Vacate Opinion. Petitioner established by uncontroverted affidavit that Special Chief Justice Robert M. Cearley, Jr., who authored the June 29, 1992 opinion, had a substantial and direct professional and personal conflict of interest which had not previously been disclosed to the parties and which prevented him from rendering an impartial decision free from the appearance of impropriety and bias. Petitioner's affidavit relating to the bias of the Special Chief Justice is reproduced as App. F, infra, 52a-53a.

On September 28, 1992, the Clerk of the Arkansas court issued without comment two letter orders stating that the Petition for Rehearing and the Motion to Suggest Disqualification had been denied. It was unclear from the September 28, 1992 letter orders as to whether Special Justice Cearley had participated in the court's decisions represented by the letter orders. Subsequently, the Clerk of the Arkansas court was contacted and it was determined that Special Justice Cearley did participate in the decisions embodied in the September 28, 1992 letter orders.

Thereafter, because of the Special Chief Justice's continued participation in the case, and in particular

his participation in the decisions represented by the September 28, 1992 letter orders, Petitioner, on October 14, 1992, filed with the Arkansas court his Motion for Disqualification, to Vacate Decisions, and for Resubmission. This Motion for Disqualification was also denied without comment by letter order issued on November 2, 1992.

### C. Specific Facts Supporting Petitioner's Constitutional Contentions.

Respondent is a member of the Arkansas Bankers Association (Bankers Association). At all times relevant to the Arkansas appellate proceedings, Special Chief Justice Cearley served as counsel for the Bankers Association.

The issues presented in the appeal to the Arkansas court involved the interpretation of a written guaranty agreement prepared by the Respondent bank and executed by Petitioner Griffin. The guaranty form was prepared by use of a pre-printed form routinely used by banks and other financial institutions.

The June 29, 1992 opinion reversed the trial court's decision in favor of Petitioner. The opinion authored by Special Justice Cearley contains interpretations of the guaranty agreement and of the Arkansas Uniform Commercial Code which are directly beneficial to Respondent and indirectly favorable and beneficial to all members of the Bankers Association. The issues which were decided in favor of Respondent as expressly set forth in the opinion involve questions of law and contract interpretation which foreseeably will arise in the future and which will involve members of the Bankers Association.

When viewed from the standpoint of an objective observer, the appearance of impropriety and the appearance of a lack of impartiality in the opinion authored by Special Chief Justice Cearley is evident based upon a review of the specific facts. Certain of these specific facts are particularly relevant for purposes of this Petition.

First, the opinion reverses as a matter of law the trial court's factual finding of the existence of an ambiguity in the guaranty executed by Petitioner. In doing so, the opinion attempts to force a reconciliation of the typewritten language of the guaranty with the printed wording of the guaranty and also requires a reconciliation of Petitioner's guaranty with those executed by the other three guarantors. As a basis for its decision, the Arkansas court held that the introduction of oral testimony to explain the inconsistencies between the language of the various guaranties violated the parol evidence rule.

Notably, on the same date as its opinion in this case, the Arkansas Supreme Court handed down its opinion in *Harris v. Stephens Production Co.*, 310 Ark. 67, 832 S.W.2d 837 (1992). The issue in *Harris* was whether parol evidence was admissible to aid in the construction of an instrument which conveyed property described as "Oil and Gas Leases." The trial judge ruled that the instrument was ambiguous and allowed parol evidence to determine the true intent of the parties. The Arkansas Supreme Court affirmed the trial judge's decision in *Harris* to admit parol evidence.

> Parol evidence to vary the terms of a written contract is one thing; such evidence to enable

> the Court to say what the parties to a contract intended to express by the language adopted in making it is quite another thing. The former is not permissible....The later is permissible, and is often absolutely essential to show the real nature of the agreement....Both rules are elementary, and do not conflict in the slightest degree with each other.... A failure to keep in mind the wide distinction between varying a contract by parol evidence and resorting to such evidence in aid of its construction often leads to error. [Emphasis in original]

*Harris*, 310 Ark. at 71, 832 S.W.2d at 839 (citations omitted.)

Even though Petitioner brought to the Arkansas court's attention in his Petition for Rehearing that the facts in *Harris* were indistinguishable from those in the present case, the Arkansas court failed to grant the rehearing and to vacate the June 29, 1992 opinion. Such a determination gives the appearance of being a result-oriented opinion favoring Respondent.

Second, Special Justice Cearley is an attorney engaged in private practice who was appointed by the Governor of the State of Arkansas to serve as a special justice for the determination of this appeal only. In his regular occupation as a private attorney, Special Chief Justice Cearley, as counsel for the Bankers Association, represents the trade association to which most of the banks in Arkansas belong. Respondent is a member of the Bankers Association. In the ordinary course of business, all banks including Respondent make frequent use of pre-printed guaranty forms. A favorable decision interpreting language in such a guaranty to cut off or waive rights of borrowers is extremely beneficial to Respondent and other members of the Bankers

Association. Special Justice Cearley's participation in the Arkansas appellate proceedings presented an opportunity on his part to provide subtle but far-reaching benefits for all members of the Bankers Association, his client.

Third, in his opinion Special Chief Justice Cearley quotes extensively from the guaranty agreement executed by Petitioner finding it to be clear and unambiguous and decreeing it to be absolute and unconditional in its application. The opinion further indicates that the wording of the guaranty effectively waived any defense pursuant to § 3-606 of the Arkansas Uniform Commercial Code (codified in Ark. Code Ann. § 9-3-606) which Petitioner could raise based upon Respondent's impairment of the real estate collateral pledged to it by Bearhouse. If the opinion is allowed to stand, all members of the Bankers Association will reap substantial benefits due to the Arkansas court's approval of the language in the guaranty in question in this suit and the opinion's favorable interpretation of §3-606 of the Arkansas Uniform Commercial Code. Because of the direct benefit to Petitioner who is a member of the Bankers Association, and the indirect future benefit to all members of the Bankers Association, there is a clearly demonstrated appearance of impropriety and bias by virtue of Justice Cearley's participation in this appeal and his authorship of the majority opinion.

The above facts provide the basis for this Petition and for Petitioner's constitutional claims. Factual allegations of this type involving the requested recusal or dismissal of a judge or justice must be taken as if true. *United States v. Trevithick*, 526 F.2d 838, 839 (8th Cir. 1975).

**D. Presentation of the Federal Constitutional Question.**

Unknown to Petitioner at all times up through the rendition of the June 29, 1992 opinion was the fact that Special Chief Justice Cearley was the counsel for the Bankers Association, a trade association of which Respondent was a member. At no time prior to the rendition of the June 29, 1992 opinion was Special Chief Justice Cearley's representation of Respondent's trade association ever disclosed to Petitioner or his counsel. Thus, still unaware of Special Chief Justice Cearley's representation of the Bankers Association, Petitioner on July 16, 1992, filed with the Arkansas court his Petition for Rehearing.

Thereafter, while the Petition for Rehearing was pending, Petitioner learned for the first time of Justice Cearley's representation as counsel of the Arkansas Bankers Association. After a brief but necessary investigation of the facts, Petitioner on August 24, 1992 filed his Motion to Suggest Disqualification and to Vacate the Opinion. See, App. G 54a-71a. The Motion to Suggest Disqualification explained in detail Petitioner's contentions that the participation of Special Chief Justice Cearley deprived Petitioner of his right to a fair, unbiased hearing before an impartial decisionmaker. In a decision in which Justice Cearley participated, Petitioner's Petition for Rehearing and his Motion to Suggest Disqualification and to Vacate Opinion, however, were denied by letter orders entered by the clerk of the Arkansas court on September 28, 1992. The letter orders, however, gave no justification or explanation for the denial of Petitioner's Rehearing

Petition or Motion for Disqualification. See, App. B, 21a-22a.

Because of Special Justice Cearley's participation in the case, and in particular, his participation in the Motion seeking his disqualification, Petitioner on October 14, 1992 filed his Motion for Disqualification, to Vacate Decisions, and for Resubmission. See, App. H 72a-86a. This Motion presented in detail Petitioner's contention that Special Justice Cearley's participation in the determination of the Arkansas appeal was a violation of Petitioner's Due Process Rights which required disqualification of the entire panel of the justices of the Arkansas court, the vacation of the June 29, 1992 opinion and all subsequent decisions rendered by the Arkansas court, and the resubmission of this appeal to a newly appointed panel of justices free from bias or partiality. In another letter opinion in which the rationale is completely absent, Petitioner's Motion for Disqualification, to Vacate Decisions, and for Resubmission was denied on November 2, 1992. See, App. C, infra, 23a.

The orders of the court below denying Petitioner's motions for disqualification and for vacation of the June 29, 1992 opinion, by necessity, had the legal effect of adversely deciding the Petitioner's constitutional challenges asserted under the Due Process Clause of the Fourteenth Amendment. Even though the letter orders entered by the Arkansas Supreme Court do not expressly address Petitioner's assertion that his Due Process rights had been violated, the Arkansas court could not have resolved both disqualification motions on an independent and adequate state ground without also rejecting the constitutional challenges presented by the

Petitioner. As such, the sub silentio decisions of the Arkansas Supreme Court are sufficient to invoke the jurisdiction of this Court. *See*, generally, *NAACP v. Alabama*, 377 U.S. 288 (1964); *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63 (1928); and *Hickie v. Starkie*, 26 U.S. (1 Pet.) 72 (1828).

## CONSIDERATIONS SUPPORTING REVIEW ON WRIT OF CERTIORARI

### 1. General Rule Governing Grant of Review.

Review of this dispute by this Court on Writ of Certiorari is proper pursuant to Rule 10.1(c) of this Court. Rule 10.1 in pertinent part provides as follows:

> . . . . The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:
>
> . . .
>
> (c) When a state court . . . has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court.

As further discussed herein, the June 29, 1992 opinion of the Arkansas Supreme Court and the subsequent rulings by that court conflict with applicable decisions of this Court which have previously resolved important principles of federal constitutional law. At a minimum, the issue presented by this Petition involves an important question of federal constitutional law which should be settled by this Court. Most significantly, this

Petition involves constitutional questions relating to this Court's duty as this nation's ultimate judicial authority charged to maintain the integrity of the judiciary and to promote public confidence and respect for our judicial system. As such, this Petition involves rights of paramount importance to the general public as well as the litigants herein.

**2. Unconstitutional Nature of Arkansas Appellate Proceedings.**

The cornerstone of our great republic is, and always has been, the adjudication of disputes before courts and tribunals free not only from bias and favoritism, but also free from the appearance of bias and partiality. As this Court has stated, "to perform its high function in the best way, 'justice must satisfy the appearance of justice.' " *In re Murchison*, 349 U.S. 133, 136 (1955) (citations omitted). The rationale supporting this principle involves not only providing fairness to the litigants, but the achievement of the more important goal of maintaining public confidence in the integrity of our judicial system.

The factual situation presented by this Petition plainly violates established notions of fundamental fairness and due process guaranteed by the Fourteenth Amendment to the United States Constitution. If the June 29, 1992 opinion of the Arkansas Supreme court is not vacated, there is a clear and present danger that public confidence in the judiciary will be eroded.

In *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813 (1986), this Court vacated and remanded the judgment of the Supreme Court of Alabama where one of the Alabama justices had an interest in the outcome of the case. In *Aetna* this Court held that

the "it certainly violates the Fourteenth Amendment . . . to subject [a person's] liberty or property to the judgment of a court, the judge of which has a direct, personal, substantial, pecuniary interest in reaching a conclusion against him in his case." *Aetna*, 475 U.S. at 821-822 (quoting *Tumey v. Ohio*, 273 U.S. 510, 523 (1927)).

In *Aetna*, a judgment was originally entered by a trial court in the State of Alabama against the appellant therein, an insurance company. This judgment was eventually affirmed by the Alabama Supreme Court. Thereafter, the appellant filed with the Alabama Supreme Court a timely application for rehearing.

Before this rehearing application was acted upon, the appellant learned that one of the justices of the Alabama Supreme Court had two similar actions pending in Alabama state courts against insurance companies alleging similar issues and damages. The appellant then filed two motions in the Alabama Supreme Court challenging that justice's participation in the decision and the justice's continued participation in considering the appellant's application for rehearing. The motions also contended that all justices of the Alabama Supreme Court should recuse. These motions were denied, but this Court agreed to review the case on appeal. Finding that the direct, personal, substantial and pecuniary interest of the Alabama justice was sufficient to establish a violation of the Due Process Clause of the Fourteenth Amendment, this Court found that the opinion of the Alabama Court had the clear and immediate effect of enhancing both the legal status and the settlement value of the Alabama justice's own pending case.

Thus, the appearance of justice was best served by vacating the Alabama appellate decisions and remanding the case.

As recognized in *Aetna*, under the Due Process Clause no judge "can be a judge in his own case [or be] permitted to try cases where he has an interest in the outcome." *Ibid.* at 822 (citing *In re Murchison*, 349 U.S. at 136). In *Murchison*, Justice Black recognized that the degree or kind of interest sufficient to disqualify a judge from sitting "cannot be defined with precision." 349 U.S. at 136. Nevertheless, as articulated by Chief Justice Burger in *Aetna*, a reasonable statement of the test as to whether the Due Process Clause has been violated is whether the

> "situation is one 'which would offer a possible temptation to the average . . . judge to . . . lead him not to hold the balance, nice, clear and true. (citation omitted).

*Aetna*, 475 U.S. 822, 825 (quoting *Ward v. Village of Monroeville*, 409 U.S. 57, 60 (1972)). Clearly, the above standard has been violated in this case.

The participation of Special Justice Cearley in the decision of this case, who at the time he participated knew or should have known that he had substantial professional and personal interests in the outcome, necessarily imparted a bias into the deliberative process. By ruling in favor of Respondent, Justice Cearley could and did confer an immediate pecuniary benefit upon a member bank of his client, the Arkansas Bankers Association. The opinion authored by Special Justice Cearley, if not vacated, also will potentially provide far-reaching benefits for all members of Justice Cearley's client by the making of law favorable to the banking

industry. Additionally, by authoring law favorable to the banking industry, Justice Cearley may find his future representation of banking clients on contested legal matters to be greatly enhanced. In fact, Special Justice Cearley foreseeably will benefit directly because of new banking clients who will seek Justice Cearley's services in the aftermath of the appellate decisions below.

Conversely, if Justice Cearley had rendered a decision in favor of Petitioner involving interpretations of Arkansas law unfavorable to banking institutions operating within the State of Arkansas, it is not unreasonable to assume that Justice Cearley would have lost his association as counsel of the Arkansas Bankers Association. This direct and personal interest of Special Justice Cearley in the outcome of this litigation by necessity "deprive[d] litigants of the assurance of impartiality that is the fundamental requirement of due process." *Aetna*, 475 U.S. at 831.

In order to establish the violation of Petitioner's Due Process rights, it is not necessary to establish that the above considerations did in fact influence Special Justice Cearley to decide in favor of the Respondent. Rather, this Court must only decide whether Justice Cearley's participation in the Arkansas appellate proceedings " 'would offer a possible temptation to the average . . . judge to. . . lead him not to hold the balance nice, clear and true.' " *Aetna*, *supra* at 825. (Citations omitted.) Stated differently, the standard is applied objectively, not subjectively. *Liljeberg v. Health Service Acquisition Corp.*, 486 U.S. 847 (1988).

In *Liljeberg*, this Court addressed a federal district judge's disqualification under 28 U.S.C. §

455.[3] In *Liljeberg*, this Court considered the Fifth Circuit Court of Appeals' decision vacating a district court opinion due to the district judge's association with a university as a member on its board of trustees during a period of time when the petitioner and the university were engaged in negotiations. These negotiations related to a dispute later litigated before this judge. Addressing the district judge's lack of knowledge and applying 28 U.S.C. § 455, this Court emphasized that scienter is not an element of the violation of § 455 and stated that while "the judge's lack of knowledge of a disqualifying circumstance may bear on the question of remedy . . . it does not eliminate the risk that 'his impartiality might reasonably be questioned' by other persons." *Liljeberg*, 486 U.S. at 859. This Court recognized that the "advancement of the purpose of the provision - to promote public confidence in the integrity of the judicial process - . . . does not depend upon whether or not the judge actually knew facts creating an appearance of

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[3] 28 U.S.C. § 455(a) in pertinent part provides in pertinent part:

> "Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."

The pertinent part of 28 U.S.C. § 455 is substantially identical in operative effect to Canon 3 of the Arkansas Code of Judicial Conduct. Canon 3(C)(1) of the Arkansas Code of Judicial Conduct provides in pertinent part:

> C. Disqualification.
>
> (1) A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned . . . .

Ark. Code of Judicial Conduct, Canon 3 (C)(1)(1988).

Consistent with the Due Process standards established in *Liljeberg*, the overall guiding principle of Canon 3 of the Arkansas Code of Judicial Conduct is that a judge should disqualify himself in a proceeding in which his impartiality might be reasonably be questioned by an objective observer. *See*, *Liljeberg*, 486 U.S. at 858-861, particularly p. 861.

impropriety, so long as the public might reasonably believe that he or she knew." *Ibid.* at 859-860.

This Court further determined in *Liljeberg* that even though the district judge did not disqualify himself in the first instance because he is without knowledge of the conflict, when he is made aware of the conflict by having his impartiality questioned, he should have disqualified himself at that time. These principles can be applied retroactively and a judge who is called upon to rectify an oversight can and should take the step to maintain public confidence in the impartiality of the judiciary. *Liljeberg* at 861. Under these circumstances, if a judge concludes that his impartiality might reasonably be questioned, or in the more obvious instance when the judge's impartiality has been questioned, then the judge should find that there has been a violation and he should rectify the situation. *Ibid.* As reiterated in *Liljeberg*, "to perform its high function in the best way 'justice must satisfy the appearance of justice.' " *Ibid.* at 864 (citation omitted).

*Liljeberg* establishes the controlling judicial standards relevant to the Due Process issue presented in this dispute. In this case, there is ample basis for concluding that an objective observer would question Justice Cearley's impartiality.

It may also be contended that Special Justice Cearley had no direct pecuniary interest in resolution of the appeal by the Arkansas Supreme Court and, therefore, there is no Due Process violation. Even if true this factor alone does not expunge the constitutional infirmity of Special Justice Cearley's participation in determination of the Arkansas appellate matters. In *Liljeberg* this

Court was presented a factual situation involving a district judge who decided litigation involving a university where he served as a member of the university's board of trustees. There was no allegation in *Liljeberg* that District Judge Collins had any direct pecuniary interest in the outcome of the litigation. Rather, Judge Collins as a member of the university's board of trustees was a fiduciary having a personal interest in the outcome of the litigation. Such interest, however, was sufficient to mandate the disqualification of Judge Collins on the constitutional ground of violation of the Due Process Clause.

The participation of Special Chief Justice Cearley in this case is not dissimilar to that of Federal Judge Collins in *Liljeberg*. Like Judge Collins, Special Justice Cearley would appear to owe a fiduciary duty to the Arkansas Bankers Association, one of his clients for which he serves as counsel. In turn, in the discharge of this fiduciary duty, it is difficult for the objective observers to believe that Special Justice Cearley could render decisions adverse to the Respondent herein, a member of Justice Cearley's client association. It is even more difficult to believe that Special Justice Cearley could render decisions establishing legal principles which could potentially have far-reaching adverse implications for all members of Justice Cearley's client. Such participation by Justice Cearley gives the appearance of impropriety and lack of impartiality which violates the Fourteenth Amendment Due Process Clause. As such, this court should grant the Petition for Writ of Certiorari and should order the Arkansas opinion vacated and this matter resubmitted for decision to a new and

disinterested panel of special justices.

### 3. Conflict of Arkansas Appellate Decisions with Decisions of this Court.

Justice Cearley's participation in this case and the ultimate decision of the appeal by the Arkansas Supreme Court creates a substantial question of federal law compelling review of this matter by this Court on Writ of Certiorari. Specifically, the appellate decisions of the Arkansas Supreme Court conflict with applicable decisions of this Court including *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813 (1986) and *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1988). The legal argument set forth in the above sections of this Petition demonstrate in detail the conflict of the Arkansas appellate decisions with the applicable decisions of this Court.

### 4. Important Question of Federal Law to be settled by this Court.

Petitioner fully expects that Respondent will contend that Arkansas decisions do not conflict with *Aetna* or *Liljeberg* on the grounds that the present case is factually distinguishable. It is expected that Respondent will contend that *Aetna* is applicable only to a situation where the justice under challenge casts the deciding vote in a multimember panel, and that *Liljeberg* involved a single trial court judge making the ultimate decision involved in a case.[4]

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[4] Petitioner concedes that the June 29, 1992 opinion and the Petition for Rehearing were decided in Respondent's favor by a 5 to 2 vote of the Arkansas Supreme Court. All other motions decided by the Arkansas Supreme Court adversely to the Petitioner were apparently decided on the basis of a unanimous vote of all participating justices.

Even if this Court determines any such contentions by Respondent merit some consideration, the granting of the Writ of Certiorari is appropriate because of the need of this Court to settle an important question of federal law. The concurring opinions in *Aetna* discussed the very considerations which are present in this case.

In his concurring opinion, Justice Brennan who wrote that the Alabama justice's interest in the outcome of the case and his participation in its disposition violated the Due Process Clause. Since the resolution of the issues by the Alabama Supreme Court enhanced the viability and settlement of that justice's own lawsuit, such interest clearly required recusal. According to Justice Brennan, it is also not necessary to suggest that the outcome might be different had the Alabama justice not provided the necessary fifth vote. Justice Brennan believed that fact to be irrelevant writing that the Alabama justice's participation in the resolution of the case was sufficient in itself to impugn the decision. In his concurring opinion, Justice Brennan explained his conclusion as follows:

> The description of an opinion as being 'for the court' connotes more than merely that the opinion has be n joined by a majority of the participating judges. It reflects the fact that these judges have exchanged ideas and arguments in deciding the case. It reflects the collective process of deliberation which shapes the court's perceptions of which issues must be addressed and, more importantly, how they must be addressed. And, while the influence of any single participant in this process can never be measured with precision, experience teaches us that each

> member's involvement plays a part in shaping the court's ultimate disposition. The participation of a judge who has a substantial interest in the outcome of a case of which he knows at the time he participates necessarily imports a bias into the deliberative process. This deprives litigants of the assurance of impartiality that is the fundamental requirement of due process.

*Aetna Life Insurance Co. v. Lavoie*, 475 U.S. at 831. (Emphasis in original.)

Likewise, Justice Blackmun, with whom Justice Marshall joined, concurred that the Alabama justice's participation denied Aetna the "impartial decisionmaker required by the Due Process Clause". *Aetna, supra*, at 831. In his concurring opinion, Justice Blackmun further stressed that the constitutional violation did not turn on the fact that the Alabama justice had cast the deciding vote:

> For me, Justice Embry's mere participation in the shared enterprise of appellate decisionmaking — whether or not he ultimately wrote, or even joined, the Alabama Supreme Court's opinion — posed an unacceptable danger of subtly distorting the decisionmaking process.

*Ibid.*

Justice Blackmun, drawing upon his experiences as a member of this Court, pointed out that the final vote is not necessarily a reliable indicator of the original views of the individual members of a multi-member panel:

> We cannot know what led each justice on the Alabama Supreme Court to the position he or she reached in this case.

> But we do know, from our own experience on this nine-Member Court, that a forceful dissent may lead Justices to rethink their original positions and change their votes. And to suggest that the author of an opinion where the final vote is 5 to 4 somehow plays a peculiarly decisive "leading role," ante, at 828, ignores the possibility of a case where the author's powers of persuasion produce an even larger margin of votes. It makes little sense to intimate that if Justice Embry's dissent had led two colleagues to switch their votes, and the final vote had been 6 to 3, Aetna would somehow not have been injured by his participation.

*Ibid*, at 832.

Justice Blackmun also points out that the obtaining of direct proof of actual bias of a justice is usually impossible "[b]ecause this collegial exchange of ideas occurs in private, a reviewing court may never discover the actual effect a biased judge had on the outcome of a particular case." *Ibid.*, at 833.

Petitioner contends that the participation of Special Justice Cearley in the Arkansas appellate decisionmaking process is clearly contrary to the holdings of this Court in *Aetna* and *Liljeberg*. However, should this Court disagree, review on Writ of Certiorari is appropriate because the issue of the participation of a biased judge in an appellate judicial proceeding, even where this judge does not cast the deciding vote, presents an important federal constitutional question which this Court should settle. Further, in view of the concurring opinions expressed in *Aetna*, the granting of requested relief to Petitioner herein is a logical extension of the principles espoused by the majority in *Aetna* and in *Liljeberg*.

## CONCLUSION

The appellate proceedings before the Supreme Court of Arkansas, if allowed to stand, will be an affront to our entire judicial system. While we may never fully know the nature and extent to which Special Chief Justice Cearley was biased toward the Respondent because of his representation of the Arkansas Bankers Association, the average member of the public would reasonably conclude that the situation present in the Arkansas proceedings were such to create a possible temptation for the average judge to lead him not to hold the balance nice, clear and true. It is this inability to fully disregard the potential temptation to Justice Cearley which violates Petitioner's Due Process rights.

Likewise, just as we may never know the full extent of Special Justice Cearley's bias toward Respondent, we also may never know the full nature and extent of Justice Cearley's influence of the ultimate decision of each of the other individual justices. The very nature of the court's private deliberative process renders such a determination impossible. The possibility that the arguments advanced and opinions stated by Justice Cearley may have influenced the other justices taints the entire Arkansas appellate process in this case with the unconstitutional appearance of bias.

For the reasons set forth herein, this Court should grant this Petition, and after full review of the proceedings below, should further order the June 29, 1992 opinion and related decisions vacated, the entire panel of Arkansas justices disqualified, and this entire matter resubmitted to a newly appointed panel of special justices free from bias or partiality.

Respectfully submitted,

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December 23, 1992

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APPENDIX A

# SUPREME COURT OF ARKANSAS

JUN 29 1992

No. 91- 65

| | |
|---|---|
| | Opinion Delivered |
| | APPEAL FROM ASHLEY COUNTY CIRCUIT COURT, NO. CIV 87-245 HONORABLE RUSSELL ROGERS, CIRCUIT JUDGE ON ASSIGNMENT |
| FIRST NATIONAL BANK OF CROSSETT, CROSSETT, ARKANSAS, APPELLANT, | |
| V. | |
| RICHARD E. GRIFFIN, | REVERSED AND REMANDED. |

**SPECIAL CHIEF JUSTICE ROBERT M. CEARLEY, JR.**

This is a suit on a guaranty. Our jurisdiction is pursuant to Rule 29(c) as the case involves the interpretation or construction of an act of the General Assembly, namely, 1961 Ark. Acts 185, § 3-606. Appellant, First National Bank of Crossett (the Bank), raises three issues on appeal. First, it argues that the trial court erred in admitting parol evidence to vary the terms of the guaranty agreement which, it maintains, is clear and unambiguous. Second, it argues that the impairment of collateral defense contained in Ark. Stat. Ann. § 85-3-606 (Add. 1961) (currently Ark. Code Ann. § 4-3-606 (1987) (repealed 1991)), is not available to one who executes a separate guaranty and, alternatively, that the defense was waived by the express language

of the guaranty agreement. Third, it argues that the trial court erred in failing to award an attorney's fee pursuant to the terms of the guaranty agreement. We reverse and remand.

## FACTS

On May 1, 1986, the Bank loaned Bearhouse, Inc. $490,000.00. The note was payable on demand or on May 1, 1987, and was secured by a mortgage on Ashley County real estate on which was situate a grain warehouse and office. Bearhouse stock was owned in equal shares by Appellee Richard E. Griffin, Cockrum, Couch and Young. Each was an officer and director of the corporation. The Bank required that each shareholder execute a separate guaranty agreement guaranteeing payment of 25% of the Bearhouse note. Before the note matured, Bearhouse closed its business in Ashley County and ceased operations. Bearhouse was later placed in involuntary bankruptcy and defaulted on the note. The Bank made demand upon each of the guarantors to pay his pro rata share of the debt. No payment was made and the Bank sued each of the guarantors. Couch filed bankruptcy and the proceedings were stayed as to him. Appellee Griffin answered alleging that the Bank had impaired the collateral by failing to properly perfect its security interest and failing to realize upon the collateral in a commercially reasonable manner, resulting in his release pursuant to Section 85-3-606. Griffin counterclaimed alleging misrepresentation, negligence, and breach of fiduciary duty. The Bank contended (1) that the defense of impairment of collateral does not apply to a party who executes a separate guaranty, and (2) that Griffin waived the defense under the express wording of the guaranty agreement.

The Bank moved for summary judgment. Cockrum and Young failed to appear at the hearing on the motion for summary judgment and summary judgment was granted as to each of them in the amount of $162,224.61. Griffin filed a response to the motion but did not file counter affidavits or other evidence in opposition. The motion was taken under advisement but never decided.

The case was tried to the court without a jury on February 13, 1990. The evidence established that, as of that date, there was due and owing on the note $683,413.91, including $490,000.00 in principal, plus accrued interest, and advances for taxes and insurance and attorney's fees. Griffin was allowed to testify, over the objection of the Bank, that he had held separate discussions with an officer of the Bank prior to the execution of the guaranty and that Griffin had only agreed to guarantee 25% of any deficiency. Griffin further testified that the value of the collateral was at least $450,000.00 at the time of the bankruptcy of Bearhouse and that, if the guarantors had been allowed to sell the property at that time, his share of the resulting deficiency would have been $17,000.00. The trial court held, in a three sentence opinion, that Griffin owed $17,000.00 of the original debt plus interest from the date of default. Judgment was entered in favor of the Bank in the amount of $17,000.00. From that Judgment comes this appeal.

## I. PAROL EVIDENCE

The parol evidence rule prohibits introduction of extrinsic evidence, parol or otherwise, which is offered to vary the terms of a written agreement. It is a substantive rule of law rather than a rule of evidence. Its premise is that the written agreement

itself is the best evidence of the intention of the parties. In *Farmers Coop. Ass'n v. Garrison,* 248 Ark. 948, 952, 454 S.W.2d 644, 646 (1970), we said: "It is a general proposition of the common law that in the absence of fraud, accident or mistake, a written contract merges, and thereby extinguishes, all prior and contemporaneous negotiations, understandings and verbal agreements on the same subject." On the other hand, the parol evidence rule does not prohibit the introduction of extrinsic evidence where it would aid the court in interpreting the meaning of particular language of a contract, such as when the contract contains terms of art or words which have acquired their meaning through a course of dealing or custom or usage. *Les-Bil, Inc. v. General Waterworks Corp.,* 256 Ark. 905, 511 S.W.2d 166 (1974). Nor does the parol evidence rule prohibit the court's acquainting itself with the circumstances surrounding the making of the contract. *Stokes v. Roberts*, 289 Ark. 319, 711 S.W.2d 757 (1986); *Schnitt v. McKellar*, 244 Ark. 377, 427 S.W.2d 202 (1968). The initial determination of the existence of ambiguity rests with the court and, if the writing contains a term which is ambiguous, parol evidence is admissible and the meaning of the ambiguous term becomes a question of fact for the factfinder. *C & A Constr. Co. Inc. v. Benning Constr. Co.,* 256 Ark. 621, 509 S.W.2d 302 (1974).

The Bank contends that the trial court erred in admitting parol evidence to vary the terms of the guaranty agreement which, it maintains, is clear and unambiguous. Each guaranty agreement was prepared on a printed form. The printed language in each form is identical. The guaranty agreement executed by Griffin contains the following

typewritten language: "guarantee (sic) limited to 25% of outstanding debt." The other three guaranty agreements contain the following language which is typewritten: "GUARANTEE (sic) LIMITED TO 25% OF TOTAL INDEBTEDNESS." Griffin first argued in the trial court and here that the language of the guaranty agreement which he executed is clear and unambiguous and that the term "outstanding debt" limits his liability to only 25% of the amount outstanding after application of proceeds from the sale of collateral. Alternatively, Griffin urged that the term "outstanding debt" is ambiguous and that parol evidence is therefore admissible to establish the intention of the parties.

We cannot agree to either proposition. In reaching our conclusion, we apply three well-established principles of contract law. First, as we have long recognized, the first rule of interpretation of a contract is to give to the language employed the meaning which the parties intended. *Lee Wilson & Co. v. Fleming*, 203 Ark. 417, 156 S.W.2d 893 (1941). Second, in construing any contract, " [w]e must consider the sense and meaning of the words used by the parties as they are taken and understood in their plain, ordinary meaning." *Farm Bureau Mut. Ins. Co. of Arkansas, Inc. v. Milburn*, 269 Ark. 384, 386, 601 S.W.2d 841, 842 (1980). Third, "[d]ifferent clauses of a contract must be read together and the contract construed so that all of its parts harmonize, if that is at all possible, and, giving effect to one clause to the exclusion of another on the same subject where the two are reconcilable, is error." *Continental Casualty Co. v. Davidson*, 250 Ark. 35, 41, 463 S.W.2d 652, 655 (1971). In *Fowler v. Unionaid Life Ins. Co.*, 180 Ark. 140, 144-145, 20

S.W.2d 611, 613 (1929), we set out the rules of construction to which we have consistently adhered:

> It is also a well-settled rule in construing a contract that the intention of the parties is to be gathered, not from particular words and phrases, but from the whole context of the agreement. In fact, it may be said to be a settled rule in the construction of contracts that the interpretation must be upon the entire instrument, and not merely on disjointed or particular parts of it. The whole context is to be considered in ascertaining the intention of the parties, even though the immediate object of inquiry is the meaning of an isolated clause. Every word in the agreement must be taken to have been used for a purpose, and no word should be rejected as mere surplusage if the court can discover any reasonable purpose thereof which can be gathered from the whole instrument. The contract must be viewed from the beginning to end, and all its terms must pass in review, for one clause may modify, limit or illuminate the other. Taking its words in their ordinary and usual meaning, no substantive clause must be allowed to perish by construction, unless insurmountable obstacles stand in the way of any other course. Seeming contradictions must be harmonized, if that course is reasonably possible. Each of its provisions must be considered in

> connection with the others and, if possible, effect must be given to all. A construction which entirely neutralizes one provision should not be adopted if the contract is susceptible of another which gives effect to all of its provisions. [Citation omitted].

We must then look to the contract as a whole and the circumstances surrounding its execution to determine the intention of the parties.

> The guaranty agreement here contains the following language:
>
> This guaranty shall be a continuing, absolute and unconditional guaranty ....
>
> ....
>
> Said Bank shall have the exclusive right to determine how, when and what application of payments and credits, if any, shall be made on said indebtedness, obligations and liabilities, or any part of them. In order to hold the undersigned liable hereunder, there shall be no obligation on the part of the said Bank at any time to first resort to, make demand on, file claim against, or exhaust its remedies against the Debtor, any one or more of the undersigned, or other persons or corporation, their properties or estates, or to resort to and exhaust its remedies against any collateral, security, property, liens or other rights whatsoever. [Emphasis added].

Construing the guaranty agreement as a whole, as

we must, we find it clear and unambiguous. The dictionary definition of the term "outstanding" includes the terms "undischarged," "uncollected" and "unpaid." The plain language of the agreement provides that the Bank may call upon the guarantor to honor his guaranty without first resorting to remedies against the debtor, other guarantors or collateral. It is simply not possible to equate "outstanding debt" to "deficiency," as Griffin urges, without closing our eyes to the other provisions of the contract. Griffin points to the difference in the language of the guaranty executed by him and that executed by the other guarantors as supporting his argument. All four guaranty agreements were prepared from the same form. They differ only in the typewritten language quoted above. Griffin executed his guaranty the day before the other three guarantors. He was at the time, and had been for over 20 years, chairman of the board of another bank and a respected attorney. There is nothing about the circumstances surrounding the execution of the guaranty which is supportive of the tortured definition of the term "outstanding debt" that is urged here. We can ascribe no different meaning to that term than we ascribe to the term "total indebtedness" when read in the context of this agreement. We hold that, under either wording, the guarantor is obligated to pay the designated percentage of all sums due pursuant to the terms of the guaranty agreement. To hold otherwise would render a substantial portion of the language of the guaranty agreement totally ineffectual.

Finding no ambiguity, we hold the parol evidence should not have been admitted. While Griffin counterclaimed alleging misrepresentation, a claim

which would have supported the admission of parol evidence, the trial court entered no finding on the claim and no cross-appeal was taken. Therefore, extrinsic evidence of intentions or antecedent agreements at variance with the terms of the contract should not have been admitted. The trial court erred in allowing its admission. We therefore reverse and remand for a new trial.

Although we reverse on the Bank's first argument, we address its second and third arguments to the extent they may arise on the remanded new trial.

**II. IMPAIRMENT OF COLLATERAL DEFENSE**

Griffin argued successfully in the trial court that the Bank's negligence caused a two year delay in the sale of the collateral during which it declined in value, and that, pursuant to Section 85-3-606, his obligation under the guaranty is discharged. We held in *Myers v. First State Bank of Sherwood*, 293 Ark. 82, 732 S.W.2d 459 (1987), that this statutory provision has no application where one executes a separate guaranty.

Additionally, the guaranty here provides that, "This guaranty shall be a continuing, absolute and unconditional guaranty ...." In *Lindell Square Ltd. Partnership v. Savers Fed. Sav. & Loan Ass'n.*, 27 Ark. App. 66, 76, 766 S.W.2d 41, 47 (1989), the Court of Appeals was called upon to determine whether the parties to a guaranty intended that the guarantor would be liable for the amount due on bonds at the time of default or for only the deficiency remaining after resorting to other security. The guaranty there likewise provided that the guarantor's obligations were unconditional and absolute. In holding that the guarantor's liability

was intended to be in addition to and independent of other security, the court noted our decision in *Bank of Morrilton v. Skipper, Tucker & Co.*, 165 Ark. 49, 263 S.W. 54 (1924), in which we said, "Under an absolute guaranty, the liability of the guarantor becomes fixed upon the debtor's default."

> The guaranty agreement here also contains the following provisions:
>
> All diligence in collection or protection, and all presentment, demand, protest and/or notice, as to any and everyone, of dishonor and of default and of non-payment and of the creation and existence of any and all of said indebtedness, obligations and liabilities, and of any security and collateral therefor, and of the acceptance of this guaranty, and of any and all extensions of credit and indulgence hereunder, are hereby expressly waived.
>
> ....
>
> No act of commission or omission of any kind, or at any time, upon the part of said Bank in respect to any matter whatsoever, shall in any way affect or impair this guaranty.

The clear language of the guaranty agreement indicates that the guarantor's liability was intended to be absolute and unconditional—the guaranty agreement so provides. Any recourse against collateral was clearly intended to be in addition to rights against the guarantor who expressly waived any defense based upon impairment of collateral.

**III. ATTORNEY'S FEE**

The Bank argues, pursuant to Ark. Code Ann. §

4-56-101 (Repl. 1991), which expressly authorizes enforcement of such a provision in a promissory note, that the Bank is entitled to recover attorney's fees not to exceed ten percent of the amount of principal and accrued interest as provided in the Bearhouse note. We do not consider the provision in the promissory note because the Bank has failed to abstract the pertinent language as required by Supreme Court Rule 9. However, the guaranty agreement provides that the guarantor agrees:

> to pay all expenses, legal and/or otherwise (including court costs and attorney's fees, paid or incurred by said Bank in endeavoring to collect such indebtedness, obligations and liabilities, or any part thereof, and in enforcing this guaranty).

We have held many times that notwithstanding that the parties have contracted for the payment of attorney's fees, such fees cannot be recovered unless expressly provided for by statute. *Damron v. University Estates. Phase II. Inc.*, 295 Ark. 533, 750 S.W.2d 402 (1988); *Harper v. Wheatley Implement Co.*, 278 Ark. 27, 643 S.W.2d 537 (1982); *Brady v. Alken. Inc.*, 273 Ark. 147, 617 S.W.2d 358 (1981); *Romer v. Leyner*, 224 Ark. 884, 277 S.W.2d 66 (1955). Prior to the enactment of 1987 Ark. Acts 519, now codified at Ark. Code Ann. §16-22-308 (Supp. 1991), the circumstances under which a party could recover attorney's fees were severely restricted. Act 519 of 1987 provides that in any civil action of a class enumerated therein, "the prevailing party may be allowed a reasonable attorney fee to be assessed by the court and collected as costs." The classes of civil action to which Act 519 applies were

expanded by amendment by 1989 Ark. Acts 800 which added actions for breach of contract. The legislature has thus granted to the courts the discretion to award a reasonable attorney's fee to a prevailing party under specific circumstances even absent agreement of the parties providing for payment of such fees. This grant of authority to award such fees absent agreement between the parties implicitly authorizes the courts to enforce such an agreement between the parties where one exists, as long as the other conditions of the statute are met. We have held that the statute should be given retrospective application. *Barnett v. Arkansas Transport Co.*, 303 Ark. 491, 798 S.W.2d 79 (1990); *City of Fayetteville v. Bibb*, 30 Ark. App. 31, 781 S.W.2d 493 (1989). The failure to award a reasonable attorney's fee here was error. Upon remand, the trial court should award an appropriate attorney's fee pursuant to the agreement of the parties.

Reversed and remanded.

Special Justice William S. Miller, Jr. joins in this opinion.

Glaze, J. and Special Justice Jerry D. Pinson, dissent.

Holt, C. J.; Dudley, J. and Brown, J., not participating.

# SUPREME COURT OF ARKANSAS

No. 91- 65 JUN 29 1992

| | |
|---|---|
| FIRST NATIONAL BANK OF CROSSETT, CROSSETT, ARKANSAS, APPELLANT, V. RICHARD E. GRIFFIN, APPELLEE | Opinion Delivered APPEAL FROM ASHLEY COUNTY CIRCUIT COURT, NO. CIV 87-245 HONORABLE RUSSELL ROGERS, CIRCUIT JUDGE ON ASSIGNMENT DISSENT. |

**JERRY D. PINSON, SPECIAL JUSTICE**

The real issue in this case is whether the trial court abused its discretion and committed error in finding the Griffin guaranty to be ambiguous and therefore allowing parol evidence to be admitted. The majority construed the guaranty agreement as a whole and found it clear and unambiguous. In coming to this conclusion, the majority found the term "outstanding debt" as used in the Griffin guaranty meant the same as "total indebtedness", as used in the other three guaranties. The majority court gave a tremendous amount of weight to the fine print boiler plate provisions of the form guaranty.

This court has stated on numerous occasions that the initial determination of the existence of an

ambiguity rests with the court and if ambiguity exists, then parol evidence is admissible and the meaning of the term becomes a question for the fact finder. *C. & A. Construction Company v. Benning Construction Company,* 256 Ark. 621, 509 S.W.2d 302 (1974). All four guaranty agreements were prepared from the same form. All four guaranties were signed within one day of each other. Why was the typed portion of Griffin's guaranty different than the other three if they all meant the same? Edward L. Holt, President of First National Bank of Crossett, the appellant, testified that a representative of the bank delivered the guaranty to Griffin to execute. There was also testimony to indicate that the bank prepared all four guaranties. There is absolutely no evidence that Griffin prepared the guaranty. It is a well established rule of contract law that documents that contain ambiguities will be construed against the party who drafted them. *Barton v. Perryman,* 265 Ark. 228, 577 S.W.2d 596 (1979). The Court of Appeals stated in *B.F. Shamburger v. The Union Bank of Benton,* 8 Ark. App. 259, 650 S.W.2d 596 (1983) that the rule in Arkansas with respect to an interpretation of a guaranty agreement is that the guarantor is entitled to have his undertaking strictly construed and he cannot be held liable beyond the strict terms of his contract.

The majority's rationale in the instant case that the fact that Griffin was at the time, and had been for over 20 years, Chairman of the Board of another bank and a respected attorney is much more supportive of the fact that Griffin would discern the difference in the terms "outstanding debt" and "total indebtedness". Also, it was very rational for the

Griffin guaranty to be less than the other three guarantors in that Griffin was the only one of the four guarantors that wasn't a full time employee of the company.

The record clearly reflects that an ambiguity was created by the appellant in using the term "outstanding indebtedness" in appellee's guaranty and the term "total indebtedness" for the other guarantors in the same transaction. Parol evidence is admissible to resolve an ambiguity in a contract to determine that particular meaning the parties intended the ambiguous provision to have. *Shamburger v. The Uni on Bank of Benton, Supra.*

I am of the opinion that the trial court did not abuse its discretion and commit error in finding the Griffin guaranty to be ambiguous and therefore allowing parol evidence to be admitted. I respectfully dissent.

Glaze, J. joins in this dissent.

# SUPREME COURT OF ARKANSAS

No. 91-65 JUN 29 1992

FIRST NATIONAL
BANK OF CROSSETT,
CROSSETT, ARKANSAS,
APPELLANT,

V.

RICHARD E. GRIFFIN,
APPELLEE

Opinion Delivered

DISSENTING OPINION

**TOM GLAZE, ASSOCIATE JUSTICE**

The factual issue is whether the appellee, Richard E. Griffin, could testify concerning the meaning of the term "outstanding debt" as used in a guaranty given him to sign by the appellant, First National Bank of Crossett (Bank). Griffin and three other men were shareholders of Bearhouse, Inc., which secured a loan from the Bank. These four shareholders guaranteed payment of Bearhouse's note to the Bank. The primary legal issue in this appeal is well-framed by Special Associate Justice Jerry D. Pinson in his dissent, viz., whether the trial court abused its discretion in allowing Griffin to testify.

Special Justice Pinson points out that Griffin's guaranty form as written and furnished by the Bank was ambiguous. He emphasizes the obvious, stating the term "outstanding indebtedness"

employed in Griffin's guaranty differs from the wording "total indebtedness" used in the guaranties signed by the other three shareholders. This difference alone raises the question, what did the parties intend by using these dissimilar terms?

As the majority correctly mentions in its opinion, the term "outstanding indebtedness" in Griffin's guaranty also conflicts with another provision contained in the same guaranty. That provision authorizes the Bank to demand Griffin to honor his guaranty without the Bank first attempting to satisfy the Bearhouse debt from other sources. Clearly, the term "outstanding indebtedness" suggests (as Griffin testified) that Griffin would be liable for any remaining Bearhouse debt after the Bank sought its other available legal remedies. Obviously, because of these conflicting terms, confusion exists concerning which provision controls — the "outstanding indebtedness" restriction that limited Griffin's liability to a deficiency amount determined after the Bank pursued its other remedies or the guaranty provision allowing the Bank to go directly against Griffin.

Instead of recognizing the Bank's and Griffin's right to explain why they used these terms and provisions in Griffin's guaranty, the majority summarily concludes the term "outstanding indebtedness" had to mean "total indebtedness" or else the guaranty provision providing the Bank did not have to first resort to other remedies would be rendered "totally ineffectual. I suggest such a conclusion strains logic. Such rationale could just as easily be used to support Griffin's position — the term "outstanding indebtedness" should control or else its meaning would be rendered "totally

ineffectual" by the provision permitting the Bank to hold Griffin liable without first seeking its other collection remedies.

The majority opinion simply ignores the issue as to whether the trial court had the discretion to allow the parties to testify regarding what they intended by using the terms they did in the Griffin guaranty instrument. While parol evidence is not admissible to vary the terms of a written contract, it is admissible to show what the parties intended by the language adopted. *Jackson County Gin Co. v. McQuistion*, 177 Ark. 60, 5 S.W.2d 729 (1928). Here, Griffin's testimony did not vary the term "outstanding indebtedness," but instead explained why that term was used rather than "total indebtedness."

In support of its decision, the majority court cites the case of *Fowler v. Unionaid Life Ins.*, 180 Ark. 140, 20 S.W.2d 611 (1929), for the rule that, in construing a contract, the intention of the parties is to be gathered, not from particular words and phrases, but from the whole context of the agreement. The rule relied upon by the court concludes as follows:

> Seeming contradictions must be harmonized, if that course is possible. Each of its provisions must be considered in connection with the others and, if possible, effect must be given to all. A construction which entirely neutralizes one provision should not be adopted if the contract is susceptible of another which gives effect to all of its provisions.

At the risk of being repetitious, the majority

court recognized the common meaning of "outstanding indebtedness," which would require the Bank to seek its other legal collection remedies before it looked to Griffin for payment. Nevertheless, it declined to give effect to the true meaning of "outstanding indebtedness" and instead, like Houdini, the majority magically construes that term to mean "total indebtedness" because that latter term is more consistent with the guaranty provision allowing the Bank to go directly against Griffin for payment of the Bearhouse note. By such tortured logic, the majority purports to give effect to all of the provisions of Griffin's guaranty, yet such a construction altogether eradicates from the guaranty the important term "outstanding indebtedness," which term's common sense meaning limited Griffin's liability to the Bank in this matter. In other words, the majority court's construction of the Griffin guaranty gives no effect or substance to this term which was specifically inserted by the parties into the Bank's guaranty form. Such a construction is certainly inconsistent with the precedent cited in the majority opinion.

In conclusion, the trial court did not abuse its discretion when confronted with these facts. Griffin signed his guaranty form at a different time and place than the other three shareholders, and as Special Justice Pinson points out, Griffin's interest in Bearhouse's day-to-day operation was limited. As a consequence, Griffin had good reason to limit his liability as he tried to do. The trial court had every right to hear testimony bearing on the parties' intent when they signed these instruments. In doing so, the court determined the parties limited Griffin's liability to the outstanding debt or deficiency amount

remaining after the Bank otherwise exhausted its other remedies and sources of payment. Because I believe the trial court did not abuse its discretion in allowing Griffin's testimony concerning the parties' intent, I would affirm.

## APPENDIX B

Office of The Clerk
Supreme Court of The State of Arkansas
Arkansas Court of Appeals
Justice Building
625 Marshall Street
Little Rock, AR 72201

September 28, 1992

Gregory M. Hopkins
Attorney at Law
1910 First Commercial Building
Little Rock, AR 72201

RE: 91-65 First National Bank of Crossett, Crossett, Arkansas v. Richard E. Griffin

Dear Mr. Hopkins:

The Supreme Court made the following order in the above styled case today:

"Petition for Rehearing is denied. Glaze, J. and Special Justice Jerry Pinson would grant. Holt, C.J., and Dudley and Brown, JJ., not participating."

Sincerely yours,

/s/

Leslie W. Steen, Clerk

LWS:rh
cc: Thomas S. Streetman
Bob Rush, Clerk
(#87-245-2)

Office of The Clerk
Supreme Court of The State of Arkansas
Arkansas Court of Appeals
Justice Building
625 Marshall Street
Little Rock, AR 72201

September 28, 1992

Gregory M. Hopkins
Attorney at Law
1910 First Commercial Building
Little Rock, AR 72201

RE: 91-65 First National Bank of Crossett, Crossett, Arkansas v. Richard E. Griffin

Dear Mr. Hopkins:

The Supreme Court made the following order in the above styled case today:

"Appellee's motion to suggest disqualification and to vacate opinion is denied. Holt, C.J., and Dudley and Brown, JJ., not participating."

Sincerely yours,
/s/
Leslie W. Steen, Clerk

LWS:rh
cc: Thomas S. Streetman

## APPENDIX C
# LAW OR CHANCERY MANDATE

STATE OF ARKANSAS )
) SCT.
In the Supreme Court )

**BE IT REMEMBERED.** That at a term of the Supreme Court of the State of Arkansas, begun and held at the Court Room in the City of Little Rock, on the 5th day, beginning the first Monday of October, A.D., 1992, amongst others were the following proceedings, to-wit:

On the 2nd day of November, A.D., 1992, a day of said term _____.

| | |
|---|---|
| First National Bank of Crossett, Crossett, Arkansas,<br>Appellant<br><br>No. 91-65 vs.<br><br>Richard E. Griffin,<br>Appellee | Appeal from Ashley Circuit Court (Circuit Court Case No. 87-245-2) |

Appellee's motion to recall mandate is denied.

Appellee's motion for disqualification, to vacate decision and for resubmission is denied.

FILED FOR RECORD
at 11:00 o'clock AM
NOV 04, 1992
BOB RUSH, CLERK
by /s/

IN TESTIMONY, That the above is a true copy of the order of said Supreme Court, rendered in the case herein stated. I, Leslie W. Steen, Clerk of said Supreme Court, hereunto set my hand and affix the seal of said Supreme Court, at my office in the city of Little Rock, this 2nd day of November, A.D., 1992.

LESLIE W. STEEN
Clerk
/s/
By: Robin Horne, D.C.

## APPENDIX D

OFFICE OF THE
CIRCUIT & CHANCERY JUDGE
*Eleventh Judicial District - East*
P. O. Box 365-Arkansas County Court House
Stuttgart, Arkansas 72160
Phone 673-3181

July 16, 1990

Mr. William Meeks
Attorney at Law
Post Office Box 71
Hamburg, AR 71646

Mr. Geoffrey B. Treece
Attorney at Law
1910 First Commercial Bldg.
Little Rock, AR 72201

Mr. Carl J. Madsen
Attorney at Law
Post office Box 232
Stuttgart, AR 72160

RE: First National Bank of Crossett v. Richard E. Griffin; Ashley County Circuit 87-245-2 on Exchange

Gentlemen:

The Court is of the opinion that Mr. Griffin owes a portion of the original guaranteed debt. That portion is $17,000.00 and judgment will be awarded for that amount plus interest since date of default.

Mr. Treece will prepare the precedent.

With best regards,

/s/

Russell Rogers
Circuit Judge on Exchange

RR:sss

cc: Circuit Court File

IN THE CIRCUIT COURT OF
ASHLEY COUNTY, ARKANSAS
SECOND DIVISION

FIRST NATIONAL BANK
OF CROSSETT,
CROSSETT, ARKANSAS PLAINTIFF

vs . No. 87-245-2

RICHARD E. GRIFFIN DEFENDANT

JUDGMENT

On this date this matter came on for entry of judgment pursuant to letter findings of fact made by the court dated July 16, 1990.

This matter was presented to the court on plaintiff's complaint, motion to dismiss and answer of separate defendant Richard Earl Griffin. Plaintiff appeared by its representative, Edward L. Holt, and by its attorneys, Arnold, Hamilton & Streetman, and defendant Richard E. Griffin appeared in person and by his attorneys, Gregory Hopkins and Geoffrey Treece. This matter was tried to the court on February 13, 1990, at which time the court heard the testimony of the witnesses and the documentary evidence introduced by the parties. At conclusion of the trial the court took the matter under submission and on July 16, 1990, the court entered a letter ruling finding that defendant Richard E. Griffin is indebted to plaintiff in the amount of $17,000.00 as his portion of the original guaranteed debt owed to plaintiff and that plaintiff ought to be granted

judgment against defendant Richard E. Griffin in the amount of $17,000.00 plus interest at 10% per annum from date of default, February 13, 1987, until paid.

IT IS THEREFORE CONSIDERED, ORDERED AND ADJUDGED that plaintiff have judgment against defendant Richard E. Griffin in the amount of $17,000.00 together with interest at the rate of 10% per annum from February 13, 1987.

Given under my hand as Circuit Judge on Exchange of Ashley County Circuit Court, Second Division, this 20th day of August, 1990, pursuant to findings made on July 16, 1990.

/s/

RUSSELL ROGERS,
CIRUIT JUDGE

## APPENDIX E
## GUARANTY

***For Value Received*** and in consideration of advances made or to be made, or credit given or to be given, or other financial accommodation from time to time afforded or to be afforded to BEARHOUSE, INC. (hereinafter designated as "Debtor"), by FIRST NATIONAL BANK OF CROSSETT, or its successor or successors, immediate or remote, by merger, consolidation, sale of a major portion of its assets, or otherwise (all of which are hereinafter called the "Bank"), the undersigned hereby jointly and severally guarantee the full and prompt payment to said Bank at maturity and at all times thereafter of any and all indebtedness, obligations and liabilities of every kind and nature of said Debtor to said Bank (including liabilities of partnerships created or arising while the Debtor may have been or may be a member thereof), howsoever evidenced, whether now existing or hereafter created or arising, whether direct or indirect, absolute or contingent, or joint or several, and howsoever owned, held or acquired, whether through discount, overdraft, purchase, direct loan or as collateral, or otherwise; and the undersigned further agree to pay all expenses, legal and/or otherwise (including court costs and attorney's fees, paid or incurred by said Bank in endeavoring to collect such indebtedness, obligations, and liabilities, or any part thereof, and in enforcing this guaranty). The right of recovery, however, against the undersigned is limited to guarantee limited to 25% of the outstanding debt dollars ($_____) plus interest on all loans and/or advances hereunder and all expenses

hereinbefore mentioned.

In case of the death, incompetency, dissolution, liquidation or insolvency (howsoever evidenced), of, or the institution of bankruptcy or receivership proceedings against said Debtor, all of said indebtedness, obligations, and liabilities then existing shall, at the option of the Bank, immediately become due or accrued and payable from the undersigned.

All dividends or other payments received from the Debtor, or on account of the debt from whatsoever source, shall be taken and applied as payment in gross, and this guaranty shall apply at the option of said Bank to and secure any ultimate balance that shall remain owing to said Bank.

Any payments made by the undersigned on the indebtedness of the Debtor and resulting in the undersigned having a claim against the Debtor shall be subordinate to any and all then existing indebtedness owed the Bank by the Debtor and also to such subsequent loans or advances which, at the option of the Bank, may be made.

This guaranty shall be a continuing, absolute, and unconditional guaranty, and shall remain in full force and effect until written notice of its discontinuance shall be actually received by said Bank, and also until any and all said indebtedness, obligations and liabilities existing before receipt of such notice shall be fully paid. The death, dissolution or withdrawal of any one or more of the undersigned shall not terminate this guaranty until notice of any such death, dissolution or withdrawal shall have been actually received by said Bank, nor until all of said indebtedness, obligations, and liabilities existing before receipt of such notice shall be fully

paid. And in the event of any such death, dissolution of withdrawal and notice thereof to the Bank, this guaranty shall, notwithstanding, continue and remain in force against the survivor or survivors until discontinued as hereinabove provided.

The liability hereunder shall in no wise be affected or impaired by (and said bank is hereby expressly authorized to make from time to time, without notice to anyone), any sale, pledge, surrender, compromise, settlement, release, renewal, extension, indulgence, alteration, substitution, exchange, change in, modification or other disposition of any of said indebtedness, obligations and liabilities, either express or implied, or of any contract or contracts evidencing any thereof, or of any security or collateral therefor. The liability hereunder shall in no wise be affected or impaired by any acceptance by said Bank of any security for or other guarantors upon any of said indebtedness, obligations or liabilities, or by any failure, neglect or omission on the part of said Bank to realize upon or protect any of said indebtedness, obligations or liabilities, or any collateral or security therefor, or to exercise any lien upon or right of appropriation of any moneys, credits or property of said Debtor, possessed by said Bank, toward the liquidation of said indebtedness, obligations, or liabilities or by any application of payments or credits thereon. Said Bank shall have the exclusive right to determine how, when and what application of payments and credits, if any, shall be made on said indebtedness, obligations and liabilities, or any part of them. In order to hold the undersigned liable hereunder, there shall be no obligation on the part of the said Bank at any time to first resort to,

make demand on, file claim against, or exhaust its remedies against the Debtor, any one or more of the undersigned, or other persons or corporations, their properties or estates, or to resort to and exhaust its remedies against any collateral, security, property, liens or other rights whatsoever. It is expressly agreed that said Bank may at any time make demand for payment or payments on, or bring suit against, the undersigned guarantors, jointly or severally, or any one or more of the undersigned, less than all, without impairing the rights of the Bank against the others of the undersigned; and that the Bank may compound with any one or more of the undersigned for such sums as it may see fit and release such of the undersigned from all further liability to the Bank for such indebtedness without impairing the right of the Bank to demand and collect the balance of such indebtedness from others of the undersigned not so released.

All diligence in collection or protection, and all presentment, demand, protest and/or notice, as to any and everyone, of dishonor and of default and of non-payment and of the creation and existence of any and all of said indebtedness, obligations and liabilities, and of any security and collateral therefor, and of the acceptance of this guaranty, and of any and all extensions of credit and indulgence hereunder, are hereby expressly waived.

The granting of credit from time to time by said Bank to said Debtor in excess of the amount to which the right of recovery under this guaranty is limited and without notice to the undersigned, is hereby also authorized and shall in no way affect or impair this guaranty.

All paper discounted for said Debtor and all

loans made to said debtor, when paid, shall be deemed to have been paid by said Debtor, unless express notice in writing is given to said Bank at the time by the undersigned that it has been paid by them.

No act of commission or omission of any kind, or at any time, upon the part of said Bank in respect to any matter whatsoever, shall in any way affect or impair this guaranty.

Said Bank may, without any notice whatsoever to any one, sell, assign or transfer all of said indebtedness, obligations and liabilities, or any part thereof, and in that event each and every immediate and successive assignee, transferee, or holder of all or any part of said indebtedness, obligations and liabilities, shall have the right to enforce this guaranty, by suit or otherwise, for the benefit of such assignee, transferee or holder, as fully as if such assignee, transferee or holder were herein by name specifically given such rights, powers, and benefits; but the said Bank shall have an unimpaired right, prior and superior to that of any said assignee, transferee or holder, to enforce their guaranty for the benefit of said Bank, as to so much of said indebtedness, obligations and liabilities that it has not sold, assigned or transferred.

Notice to the undersigned guarantors of the acceptance of this guaranty and of the making or renewing of any loan or paper is hereby expressly waived by the undersigned.

No release or discharge of any one or more of the undersigned shall release or discharge any of the other of the undersigned, unless and until all of said indebtedness obligations and liabilities shall have been fully paid and discharged.

This guaranty shall be construed according to the law of the State of Arkansas, in which State it shall be performed by the undersigned.

This guaranty and every part thereof, shall be binding upon the undersigned, jointly and severally, and upon the heirs, legal representatives, successors and assigns of all the undersigned, and each of them, respectively.

After having carefully read this instrument, the same was signed, sealed, and delivered by the undersigned, this 30th day of April, 1986, and was thereafter received and accepted by said Bank of Crossett, Arkansas.

| | |
|---|---|
| /s/ | /s/ |
| Witness | Richard Earl Griffin |
| | |
| Witness | |
| | |
| Witness | |

## GUARANTY

***For Value Received*** and in consideration of advances made or to be made, or credit given or to be given, or other financial accommodation from time to time afforded or to be afforded to BEARHOUSE, INC. (hereinafter designated as "Debtor"), by FIRST NATIONAL BANK OF CROSSETT, or its successor or successors, immediate or remote, by merger, consolidation, sale of a major portion of its assets, or otherwise (all of which are hereinafter called the "Bank"), the undersigned hereby jointly and severally guarantee the full and prompt payment to said Bank at maturity and at all times thereafter of any and all indebtedness, obligations and liabilities of every kind and nature of said Debtor to said Bank (including liabilities of partnerships created or arising while the Debtor may have been or may be a member thereof), howsoever evidenced, whether now existing or hereafter created or arising, whether direct or indirect, absolute or contingent, or joint or several, and howsoever owned, held or acquired, whether through discount, overdraft, purchase, direct loan or as collateral, or otherwise; and the undersigned further agree to pay all expenses, legal and/or otherwise (including court costs and attorney's fees, paid or incurred by said Bank in endeavoring to collect such indebtedness, obligations, and liabilities, or any part thereof, and in enforcing this guaranty). The right of recovery, however, against the undersigned is limited to GUARANTEE LIMITED TO 25% OF TOTAL INDEBTEDNESS DOLLARS ($_____) plus interest on all loans and/or advances hereunder and all expenses

hereinbefore mentioned.

In case of the death, incompetency, dissolution, liquidation or insolvency (howsoever evidenced), of, or the institution of bankruptcy or receivership proceedings against said Debtor, all of said indebtedness, obligations, and liabilities then existing shall, at the option of the Bank, immediately become due or accrued and payable from the undersigned.

All dividends or other payments received from the Debtor, or on account of the debt from whatsoever source, shall be taken and applied as payment in gross, and this guaranty shall apply at the option of said Bank to and secure any ultimate balance that shall remain owing to said Bank.

Any payments made by the undersigned on the indebtedness of the Debtor and resulting in the undersigned having a claim against the Debtor shall be subordinate to any and all then existing indebtedness owed the Bank by the Debtor and also to such subsequent loans or advances which, at the option of the Bank, may be made.

This guaranty shall be a continuing, absolute, and unconditional guaranty, and shall remain in full force and effect until written notice of its discontinuance shall be actually received by said Bank, and also until any and all said indebtedness, obligations and liabilities existing before receipt of such notice shall be fully paid. The death, dissolution or withdrawal of any one or more of the undersigned shall not terminate this guaranty until notice of any such death, dissolution or withdrawal shall have been actually received by said Bank, nor until all of said indebtedness, obligations, and liabilities existing before receipt of such notice shall be fully paid. And in the event of any such death, dissolution of

withdrawal and notice thereof to the Bank, this guaranty shall, notwithstanding, continue and remain in force against the survivor or survivors until discontinued as hereinabove provided.

The liability hereunder shall in no wise be affected or impaired by (and said bank is hereby expressly authorized to make from time to time, without notice to anyone), any sale, pledge, surrender, compromise, settlement, release, renewal, extension, indulgence, alteration, substitution, exchange, change in, modification or other disposition of any of said indebtedness, obligations and liabilities, either express or implied, or of any contract or contracts evidencing any thereof, or of any security or collateral therefor. The liability hereunder shall in no wise be affected or impaired by any acceptance by said Bank of any security for or other guarantors upon any of said indebtedness, obligations or liabilities, or by any failure, neglect or omission on the part of said Bank to realize upon or protect any of said indebtedness, obligations or liabilities, or any collateral or security therefor, or to exercise any lien upon or right of appropriation of any moneys, credits or property of said Debtor, possessed by said Bank, toward the liquidation of said indebtedness, obligations, or liabilities or by any application of payments or credits thereon. Said Bank shall have the exclusive right to determine how, when and what application of payments and credits, if any, shall be made on said indebtedness, obligations and liabilities, or any part of them. In order to hold the undersigned liable hereunder, there shall be no obligation on the part of the said Bank at any time to first resort to, make demand on, file claim against, or exhaust its

remedies against the Debtor, any one or more of the undersigned, or other persons or corporations, their properties or estates, or to resort to and exhaust its remedies against any collateral, security, property, liens or other rights whatsoever. It is expressly agreed that said Bank may at any time make demand for payment or payments on, or bring suit against, the undersigned guarantors, jointly or severally, or any one or more of the undersigned, less than all, without impairing the rights of the Bank against the others of the undersigned; and that the Bank may compound with any one or more of the undersigned for such sums as it may see fit and release such of the undersigned from all further liability to the Bank for such indebtedness without impairing the right of the Bank to demand and collect the balance of such indebtedness from others of the undersigned not so released.

All diligence in collection or protection, and all presentment, demand, protest and/or notice, as to any and everyone, of dishonor and of default and of non-payment and of the creation and existence of any and all of said indebtedness, obligations and liabilities, and of any security and collateral therefor, and of the acceptance of this guaranty, and of any and all extensions of credit and indulgence hereunder, are hereby expressly waived.

The granting of credit from time to time by said Bank to said Debtor in excess of the amount to which the right of recovery under this guaranty is limited and without notice to the undersigned, is hereby also authorized and shall in no way affect or impair this guaranty.

All paper discounted for said Debtor and all loans made to said debtor, when paid, shall be

deemed to have been paid by said Debtor, unless express notice in writing is given to said Bank at the time by the undersigned that it has been paid by them.

No act of commission or omission of any kind, or at any time, upon the part of said Bank in respect to any matter whatsoever, shall in any way affect or impair this guaranty.

Said Bank may, without any notice whatsoever to any one, sell, assign or transfer all of said indebtedness, obligations and liabilities, or any part thereof, and in that event each and every immediate and successive assignee, transferee, or holder of all or any part of said indebtedness, obligations and liabilities, shall have the right to enforce this guaranty, by suit or otherwise, for the benefit of such assignee, transferee or holder, as fully as if such assignee, transferee or holder were herein by name specifically given such rights, powers, and benefits; but the said Bank shall have an unimpaired right, prior and superior to that of any said assignee, transferee or holder, to enforce their guaranty for the benefit of said Bank, as to so much of said indebtedness, obligations and liabilities that it has not sold, assigned or transferred.

Notice to the undersigned guarantors of the acceptance of this guaranty and of the making or renewing of any loan or paper is hereby expressly waived by the undersigned.

No release or discharge of any one or more of the undersigned shall release or discharge any of the other of the undersigned, unless and until all of said indebtedness obligations and liabilities shall have been fully paid and discharged.

This guaranty shall be construed according to

the law of the State of Arkansas, in which State it shall be performed by the undersigned.

This guaranty and every part thereof, shall be binding upon the undersigned, jointly and severally, and upon the heirs, legal representatives, successors and assigns of all the undersigned, and each of them, respectively.

After having carefully read this instrument, the same was signed, sealed, and delivered by the undersigned, this 1st day of May, 1986, and was thereafter received and accepted by said Bank of Crossett, Arkansas.

| /s/ | /s/ |
|---|---|
| Witness | Bob Cockrum |
| | |
| Witness | |
| | |
| Witness | |

## GUARANTY

***For Value Received*** and in consideration of advances made or to be made, or credit given or to be given, or other financial accommodation from time to time afforded or to be afforded to BEARHOUSE, INC. (hereinafter designated as "Debtor"), by FIRST NATIONAL BANK OF CROSSETT, or its successor or successors, immediate or remote, by merger, consolidation, sale of a major portion of its assets, or otherwise (all of which are hereinafter called the "Bank"), the undersigned hereby jointly and severally guarantee the full and prompt payment to said Bank at maturity and at all times thereafter of any and all indebtedness, obligations and liabilities of every kind and nature of said Debtor to said Bank (including liabilities of partnerships created or arising while the Debtor may have been or may be a member thereof), howsoever evidenced, whether now existing or hereafter created or arising, whether direct or indirect, absolute or contingent, or joint or several, and howsoever owned, held or acquired, whether through discount, overdraft, purchase, direct loan or as collateral, or otherwise; and the undersigned further agree to pay all expenses, legal and/or otherwise (including court costs and attorney's fees, paid or incurred by said Bank in endeavoring to collect such indebtedness, obligations, and liabilities, or any part thereof, and in enforcing this guaranty). The right of recovery, however, against the undersigned is limited to GUARANTEE LIMITED TO 25% OF TOTAL INDEBTEDNESS DOLLARS ($_____) plus interest on all loans and/or advances hereunder and all expenses

hereinbefore mentioned.

In case of the death, incompetency, dissolution, liquidation or insolvency (howsoever evidenced), of, or the institution of bankruptcy or receivership proceedings against said Debtor, all of said indebtedness, obligations, and liabilities then existing shall, at the option of the Bank, immediately become due or accrued and payable from the undersigned.

All dividends or other payments received from the Debtor, or on account of the debt from whatsoever source, shall be taken and applied as payment in gross, and this guaranty shall apply at the option of said Bank to and secure any ultimate balance that shall remain owing to said Bank.

Any payments made by the undersigned on the indebtedness of the Debtor and resulting in the undersigned having a claim against the Debtor shall be subordinate to any and all then existing indebtedness owed the Bank by the Debtor and also to such subsequent loans or advances which, at the option of the Bank, may be made.

This guaranty shall be a continuing, absolute, and unconditional guaranty, and shall remain in full force and effect until written notice of its discontinuance shall be actually received by said Bank, and also until any and all said indebtedness, obligations and liabilities existing before receipt of such notice shall be fully paid. The death, dissolution or withdrawal of any one or more of the undersigned shall not terminate this guaranty until notice of any such death, dissolution or withdrawal shall have been actually received by said Bank, nor until all of said indebtedness, obligations, and liabilities existing before receipt of such notice shall be fully

paid. And in the event of any such death, dissolution of withdrawal and notice thereof to the Bank, this guaranty shall, notwithstanding, continue and remain in force against the survivor or survivors until discontinued as hereinabove provided.

The liability hereunder shall in no wise be affected or impaired by (and said bank is hereby expressly authorized to make from time to time, without notice to anyone), any sale, pledge, surrender, compromise, settlement, release, renewal, extension, indulgence, alteration, substitution, exchange, change in, modification or other disposition of any of said indebtedness, obligations and liabilities, either express or implied, or of any contract or contracts evidencing any thereof, or of any security or collateral therefor. The liability hereunder shall in no wise be affected or impaired by any acceptance by said Bank of any security for or other guarantors upon any of said indebtedness, obligations or liabilities, or by any failure, neglect or omission on the part of said Bank to realize upon or protect any of said indebtedness, obligations or liabilities, or any collateral or security therefor, or to exercise any lien upon or right of appropriation of any moneys, credits or property of said Debtor, possessed by said Bank, toward the liquidation of said indebtedness, obligations, or liabilities or by any application of payments or credits thereon. Said Bank shall have the exclusive right to determine how, when and what application of payments and credits, if any, shall be made on said indebtedness, obligations and liabilities, or any part of them. In order to hold the undersigned liable hereunder, there shall be no obligation on the part of the said Bank at any time to first resort to,

make demand on, file claim against, or exhaust its remedies against the Debtor, any one or more of the undersigned, or other persons or corporations, their properties or estates, or to resort to and exhaust its remedies against any collateral, security, property, liens or other rights whatsoever. It is expressly agreed that said Bank may at any time make demand for payment or payments on, or bring suit against, the undersigned guarantors, jointly or severally, or any one or more of the undersigned, less than all, without impairing the rights of the Bank against the others of the undersigned; and that the Bank may compound with any one or more of the undersigned for such sums as it may see fit and release such of the undersigned from all further liability to the Bank for such indebtedness without impairing the right of the Bank to demand and collect the balance of such indebtedness from others of the undersigned not so released.

All diligence in collection or protection, and all presentment, demand, protest and/or notice, as to any and everyone, of dishonor and of default and of non-payment and of the creation and existence of any and all of said indebtedness, obligations and liabilities, and of any security and collateral therefor, and of the acceptance of this guaranty, and of any and all extensions of credit and indulgence hereunder, are hereby expressly waived.

The granting of credit from time to time by said Bank to said Debtor in excess of the amount to which the right of recovery under this guaranty is limited and without notice to the undersigned, is hereby also authorized and shall in no way affect or impair this guaranty.

All paper discounted for said Debtor and all

loans made to said debtor, when paid, shall be deemed to have been paid by said Debtor, unless express notice in writing is given to said Bank at the time by the undersigned that it has been paid by them.

No act of commission or omission of any kind, or at any time, upon the part of said Bank in respect to any matter whatsoever, shall in any way affect or impair this guaranty.

Said Bank may, without any notice whatsoever to any one, sell, assign or transfer all of said indebtedness, obligations and liabilities, or any part thereof, and in that event each and every immediate and successive assignee, transferee, or holder of all or any part of said indebtedness, obligations and liabilities, shall have the right to enforce this guaranty, by suit or otherwise, for the benefit of such assignee, transferee or holder, as fully as if such assignee, transferee or holder were herein by name specifically given such rights, powers, and benefits; but the said Bank shall have an unimpaired right, prior and superior to that of any said assignee, transferee or holder, to enforce their guaranty for the benefit of said Bank, as to so much of said indebtedness, obligations and liabilities that it has not sold, assigned or transferred.

Notice to the undersigned guarantors of the acceptance of this guaranty and of the making or renewing of any loan or paper is hereby expressly waived by the undersigned.

No release or discharge of any one or more of the undersigned shall release or discharge any of the other of the undersigned, unless and until all of said indebtedness obligations and liabilities shall have been fully paid and discharged.

This guaranty shall be construed according to the law of the State of Arkansas, in which State it shall be performed by the undersigned.

This guaranty and every part thereof, shall be binding upon the undersigned, jointly and severally, and upon the heirs, legal representatives, successors and assigns of all the undersigned, and each of them, respectively.

After having carefully read this instrument, the same was signed, sealed, and delivered by the undersigned, this 1st day of May, 1986, and was thereafter received and accepted by said Bank of Crossett, Arkansas.

| | |
|---|---|
| /s/ | /s/ |
| Witness | Lonnie Couch |
| | |
| Witness | |
| | |
| Witness | |

## GUARANTY

***For Value Received*** and in consideration of advances made or to be made, or credit given or to be given, or other financial accommodation from time to time afforded or to be afforded to BEARHOUSE, INC. (hereinafter designated as "Debtor"), by FIRST NATIONAL BANK OF CROSSETT, or its successor or successors, immediate or remote, by merger, consolidation, sale of a major portion of its assets, or otherwise (all of which are hereinafter called the "Bank"), the undersigned hereby jointly and severally guarantee the full and prompt payment to said Bank at maturity and at all times thereafter of any and all indebtedness, obligations and liabilities of every kind and nature of said Debtor to said Bank (including liabilities of partnerships created or arising while the Debtor may have been or may be a member thereof), howsoever evidenced, whether now existing or hereafter created or arising, whether direct or indirect, absolute or contingent, or joint or several, and howsoever owned, held or acquired, whether through discount, overdraft, purchase, direct loan or as collateral, or otherwise; and the undersigned further agree to pay all expenses, legal and/or otherwise (including court costs and attorney's fees, paid or incurred by said Bank in endeavoring to collect such indebtedness, obligations, and liabilities, or any part thereof, and in enforcing this guaranty). The right of recovery, however, against the undersigned is limited to GUARANTEE LIMITED TO 25% OF TOTAL INDEBTEDNESS DOLLARS ($_____) plus interest on all loans and/or advances hereunder and all expenses

hereinbefore mentioned.

In case of the death, incompetency, dissolution, liquidation or insolvency (howsoever evidenced), of, or the institution of bankruptcy or receivership proceedings against said Debtor, all of said indebtedness, obligations, and liabilities then existing shall, at the option of the Bank, immediately become due or accrued and payable from the undersigned.

All dividends or other payments received from the Debtor, or on account of the debt from whatsoever source, shall be taken and applied as payment in gross, and this guaranty shall apply at the option of said Bank to and secure any ultimate balance that shall remain owing to said Bank.

Any payments made by the undersigned on the indebtedness of the Debtor and resulting in the undersigned having a claim against the Debtor shall be subordinate to any and all then existing indebtedness owed the Bank by the Debtor and also to such subsequent loans or advances which, at the option of the Bank, may be made.

This guaranty shall be a continuing, absolute, and unconditional guaranty, and shall remain in full force and effect until written notice of its discontinuance shall be actually received by said Bank, and also until any and all said indebtedness, obligations and liabilities existing before receipt of such notice shall be fully paid. The death, dissolution or withdrawal of any one or more of the undersigned shall not terminate this guaranty until notice of any such death, dissolution or withdrawal shall have been actually received by said Bank, nor until all of said indebtedness, obligations, and liabilities existing before receipt of such notice shall be fully

paid. And in the event of any such death, dissolution of withdrawal and notice thereof to the Bank, this guaranty shall, notwithstanding, continue and remain in force against the survivor or survivors until discontinued as hereinabove provided.

The liability hereunder shall in no wise be affected or impaired by (and said bank is hereby expressly authorized to make from time to time, without notice to anyone), any sale, pledge, surrender, compromise, settlement, release, renewal, extension, indulgence, alteration, substitution, exchange, change in, modification or other disposition of any of said indebtedness, obligations and liabilities, either express or implied, or of any contract or contracts evidencing any thereof, or of any security or collateral therefor. The liability hereunder shall in no wise be affected or impaired by any acceptance by said Bank of any security for or other guarantors upon any of said indebtedness, obligations or liabilities, or by any failure, neglect or omission on the part of said Bank to realize upon or protect any of said indebtedness, obligations or liabilities, or any collateral or security therefor, or to exercise any lien upon or right of appropriation of any moneys, credits or property of said Debtor, possessed by said Bank, toward the liquidation of said indebtedness, obligations, or liabilities or by any application of payments or credits thereon. Said Bank shall have the exclusive right to determine how, when and what application of payments and credits, if any, shall be made on said indebtedness, obligations and liabilities, or any part of them. In order to hold the undersigned liable hereunder, there shall be no obligation on the part of the said Bank at any time to first resort to,

make demand on, file claim against, or exhaust its remedies against the Debtor, any one or more of the undersigned, or other persons or corporations, their properties or estates, or to resort to and exhaust its remedies against any collateral, security, property, liens or other rights whatsoever. It is expressly agreed that said Bank may at any time make demand for payment or payments on, or bring suit against, the undersigned guarantors, jointly or severally, or any one or more of the undersigned, less than all, without impairing the rights of the Bank against the others of the undersigned; and that the Bank may compound with any one or more of the undersigned for such sums as it may see fit and release such of the undersigned from all further liability to the Bank for such indebtedness without impairing the right of the Bank to demand and collect the balance of such indebtedness from others of the undersigned not so released.

All diligence in collection or protection, and all presentment, demand, protest and/or notice, as to any and everyone, of dishonor and of default and of non-payment and of the creation and existence of any and all of said indebtedness, obligations and liabilities, and of any security and collateral therefor, and of the acceptance of this guaranty, and of any and all extensions of credit and indulgence hereunder, are hereby expressly waived.

The granting of credit from time to time by said Bank to said Debtor in excess of the amount to which the right of recovery under this guaranty is limited and without notice to the undersigned, is hereby also authorized and shall in no way affect or impair this guaranty.

All paper discounted for said Debtor and all

loans made to said debtor, when paid, shall be deemed to have been paid by said Debtor, unless express notice in writing is given to said Bank at the time by the undersigned that it has been paid by them.

No act of commission or omission of any kind, or at any time, upon the part of said Bank in respect to any matter whatsoever, shall in any way affect or impair this guaranty.

Said Bank may, without any notice whatsoever to any one, sell, assign or transfer all of said indebtedness, obligations and liabilities, or any part thereof, and in that event each and every immediate and successive assignee, transferee, or holder of all or any part of said indebtedness, obligations and liabilities, shall have the right to enforce this guaranty, by suit or otherwise, for the benefit of such assignee, transferee or holder, as fully as if such assignee, transferee or holder were herein by name specifically given such rights, powers, and benefits; but the said Bank shall have an unimpaired right, prior and superior to that of any said assignee, transferee or holder, to enforce their guaranty for the benefit of said Bank, as to so much of said indebtedness, obligations and liabilities that it has not sold, assigned or transferred.

Notice to the undersigned guarantors of the acceptance of this guaranty and of the making or renewing of any loan or paper is hereby expressly waived by the undersigned.

No release or discharge of any one or more of the undersigned shall release or discharge any of the other of the undersigned, unless and until all of said indebtedness obligations and liabilities shall have been fully paid and discharged.

This guaranty shall be construed according to the law of the State of Arkansas, in which State it shall be performed by the undersigned.

This guaranty and every part thereof, shall be binding upon the undersigned, jointly and severally, and upon the heirs, legal representatives, successors and assigns of all the undersigned, and each of them, respectively.

After having carefully read this instrument, the same was signed, sealed, and delivered by the undersigned, this 1st day of May, 1986, and was thereafter received and accepted by said Bank of Crossett, Arkansas.

| | |
|---|---|
| /s/ | /s/ |
| Witness | Jim Young |
| Witness | |
| Witness | |

**APPENDIX F**

SUPREME COURT OF ARKANSAS

FIRST NATIONAL
BANK OF CROSSETT,
CROSSETT, ARKANSAS APPELLANT

VS. NO. 91-65

RICHARD E. GRIFFIN APPELLEE

**AFFIDAVIT OF ALLEN CARNEY**

STATE OF ARKANSAS)
) ss .
COUNTY OF PULASKI)

I, Allen Carney, do hereby state on oath the following:

1. I am presently a summer law clerk with the Hopkins & James, P.A. I have been employed as a law clerk with this firm since May, 1992.

2. Recently I placed two telephone calls to the telephone number listed for the Arkansas Bankers Association in Little Rock, Arkansas. The two telephone calls were regarding whether Robert M. Cearley, Jr. had any relation with the Arkansas Bankers Association as attorney or counsel and whether First National Bank of Crossett, Arkansas, Appellant in an appeal before the Arkansas Supreme Court, Case No. 91-65, is a member of the Association.

3. In my first telephone call to the Arkansas Bankers Association I was transferred to someone who could answer my questions. I asked that person

if the Arkansas Bankers Association had in-house counsel or employed outside counsel. The person stated that the Arkansas Bankers Association does not have in-house counsel, but that Robert Cearley acted as adjunct counsel.

4. In my second telephone conversation with the Arkansas Bankers Association, the person who answered the phone confirmed that First National Bank of Crossett is a member of the Arkansas Bankers Association.

5. I hereby declare that all statements made herein of my own knowledge are true and that all statements are made on information and belief I believe to be true.

FURTHER AFFIANT SAYETH NOT.

Dated this 18th day of August, 1992

/s/
ALLEN CARNEY

SUBSCRIBED AND SWORN TO ME before this 18th day of August, 1992.

/s/
Carolyn Louise Fritts
NOTARY PUBLIC

My Commission Expires
11/11/2000
(SEAL)

**APPENDIX G**

IN THE SUPREME COURT OF ARKANSAS

FIRST NATIONAL BANK
OF CROSSETT,
CROSSETT, ARKANSAS APPELLANT

V. No. 91-65

RICHARD E. GRIFFIN APPELLEE

MOTION TO SUGGEST DISQUALIFICATION AND TO VACATE OPINION

Comes the Appellee, Richard E. Griffin ("Griffin"), by and through his counsel, Hopkins & James, P.A., and for his Motion to Suggest Disqualification and to Vacate Opinion, pursuant to Rule 27, Rules of the Arkansas Supreme Court, states as follows:

I.

Because of the appearance of a lack of impartiality and the appearance of impropriety, Special Chief Justice Robert M. Cearley, Jr. ("Justice Cearley") should disqualify from further participation in this proceeding. Additionally, the Opinion of this Court delivered June 29, 1992 (the "Opinion"), authored by Justice Cearley, should be vacated and set aside. The primary factual bases for this Motion are as follows:

A. Appellant, First National Bank of Crossett, (the "Bank") is a member of the Arkansas Bankers Association (the "Bankers Association").

B. Justice Cearley presently serves as counsel

for the Bankers Association on certain matters.

C. The issues presented by this appeal involve the interpretation of a written guaranty agreement prepared by the Bank and executed by Griffin. The guaranty agreement was prepared by the use of a pre-printed form of a type routinely used by banks and other financial institutions.

D. This appeal also involves the interpretation and construction of § 3-606 of the Arkansas Uniform Commercial Code (the "UCC").

E. The Opinion reversed the trial court's decision in favor of Griffin. The Opinion contains interpretations of the guaranty agreement and of UCC § 3-606 which are directly beneficial to the Bank and indirectly favorable and beneficial to all of the members of the Bankers Association.

F. This issues which were decided in favor of the Bank in the Opinion involve questions of law and contract interpretation which foreseeably will arise in the future and will involve members of the Bankers Association. Specifically, this appeal addresses issues relating to a guarantor's ability to limit liability in a written guaranty agreement and a bank's ability to have a guarantor to waive certain rights, including defenses based upon UCC § 3-606, in advance by inclusion of language in a pre-printed guaranty form.

G. At no time prior to the filing of this Motion has Justice Cearley disclosed to Griffin his representation of the Bankers Association or that the Bank is a member of the Bankers

Association. At the time of the June 29, 1992 Opinion, Griffin was unaware of Justice Cearley's representation of the Bankers Association. Griffin only recently learned of these facts.

In support of this Motion, Griffin furnishes the following information attached hereto and identified as follows:

Attachment No. 1 - Affidavit from Allen Carney, law clerk for counsel for Griffin, executed August 18, 1992. The affidavit verifies Justice Cearley's relationship with the Bankers Association as its counsel and further verifies that the Bank is a present member of the Bankers Association.

Attachment No. 2 - Copy of the June 29, 1992 Opinion along with the two dissenting opinions handed down in this case on June 29, 1992.

According to the Rules of the Supreme Court, a Rule 27 Suggestion of Disqualification is to be filed prior to the submission of this case. However, this information has only now come to the attention of Griffin and his counsel. Accordingly, this Motion is made at the earliest possible time.

III.

Attachments Nos. 1 and 2 provide the basis for the disqualification of Justice Cearley. Based upon the attachments noted above, Justice Cearley should disqualify himself from further participation in this proceeding due to the appearance of a lack of impartiality. It appears reasonable that an objective observer with knowledge of the facts set forth above would question Justice Cearley's personal bias or prejudice in the case at bar in light of his representation of the Bankers Association. Further, the Bank, a member of the Bankers Association,

will be directly and adversely affected by the affirmance of the trial court decision in this case. However, If the trial court's decision is ultimately reversed (as held in the Opinion), the outcome of this appeal will have the appearance of unfairly benefiting the Bank, which is indirectly represented by Justice Cearley by virtue of his representation of the Bankers Association.

The Supreme Court of Arkansas has adopted the Code of Judicial Conduct (the "Code") promulgated by the American Bar Association, as amended, as the proper standards for the conduct of the judiciary in this state.[1] Applicable case law has made it clear that the Supreme Court regards the Code as the law governing judicial conduct in Arkansas. *Jim Halsey Company v. Bonar*, 284 Ark. 461, 683 S.W.2d 898 (1985); *Ford v. State*, 276 Ark. 98, 633 S.W.2d 3 (1982). Canon 3(C)(1) of the Code provides that a judge should disqualify himself in any proceeding in which his impartiality might reasonably be questioned including one where he has a personal bias or prejudice or other interest which might be affected by the outcome of the proceedings. Similarly, this Court has held on previous occasions, in considering Canon 2 of the Code,[2] that a judge is to

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[1] Although Justice Cearley wag acting as judge pro tempore at the appointment of the Governor's Office, he must still comply with Canon 2 and Canon 3 of the Arkansas Code of Judicial Conduct. Ark. Code of Judicial Conduct, Canon 7(B) (1988)

[2] Canon 2 of the Code provided in pertinent part:

CANON 2

A JUDGE SHOULD AVOID IMPROPRIETY AND THE APPEARANCE OF IMPROPRIETY IN ALL HIS ACTIVITIES

A. A judge should respect and comply with the law and should conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

B. A judge should not allow his ... relationships to influence his judicial conduct or judgment.

Ark. Code of Judicial Conduct, Canon 2 (1988).

avoid not only all impropriety, but also any appearance of impropriety. *Patterson v. R.T.*, 301 Ark. 400, 784 S.W.2d 777 (1990). The judge should not only be fair but appear fair. *Farley v. Jester*, 257 Ark. 686, 520 S.W.2d 200 (1975).

In the eyes of the public judges are the cornerstone of our judicial system and, as such, each judge is held to a high standard of conduct. See Ark. Code of Judicial Conduct, Canon 1 (1988). A judge should therefore expect to be the subject of constant public scrutiny and accordingly must accept restrictions on his conduct that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly. Ark. Code of Judicial Conduct, Canon 2, Comment (1988).

This Court has long recognized the importance of its task and has always been conscientious of its reputation and meaning to those persons who come to this Court for final judgment regarding their rights, privileges, and liberties. *Johnson v. Sturdivant*, 295 Ark. 622, 758 S.W.2d 415, 416 (1988). A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned. *Id.*

In *Johnson v. Sturdivant*, this Court relied on the United States Supreme Court case of *Liljeberg v. Health Services Acquisition,* 486 U.S. 847 (1988), for guidance in determining whether the Court should set aside and resubmit a case for consideration due to inquiry about a judge's impartiality. Based upon the United States Supreme Court's logic in *Liljeberg*, once one of the justices disqualified after having his impartiality called into issue, the Arkansas Supreme Court set aside its previous opinion affirming the trial court and

resubmitted the appeal to an entirely new panel of special justices appointed thereafter.

Because of its similarity to the present case, *Liljeberg* is most instructive on the issues presented by this Motion.

In *Liljeberg*, the United States Supreme Court addressed a judge's disqualification under 28 U.S.C. § 455.[3] The pertinent part of 28 U.S.C. § 455 is substantially identical in operative effect to Canon 3 of the Arkansas Code of Judicial Conduct. Canon 3(C)(1) of the Arkansas Code of Judicial Conduct provides in pertinent part:

> C. Disqualification.
>
> (1) A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned . . . .

Ark. Code of Judicial Conduct, Canon 3 (c)(1)(1988).

The overall guiding principle of Canon 3 is that a judge should disqualify himself in a proceeding in which his impartiality might be reasonably be questioned by an objective observer. *See, e.g.*, *Liljeberg*, 486 U.S. at 858-861, particularly p. 861.

The appearance of impropriety and the appearance of a lack of impartiality in the Opinion authored by Justice Cearley, when viewed from the standpoint of an objective observer, is particularly evident based upon a review of the facts. While these factors are discussed in detail in Griffin's Petition for Rehearing, certain of these factors are particularly relevant for purposes of this Motion.

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[3] 28 U.S.C. S 455(a) in pertinent part provides:

"Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be question."

First, the Opinion reverses as a matter of law the trial court's factual finding of the existence of an ambiguity in the guaranty executed by Griffin. In doing so, the Opinion attempts to force a reconciliation of the typewritten language of the guaranty with the printed wording of the guaranty and also requires a reconciliation of Griffin's guaranty with those executed by the other three guarantors. Such a determination gives the appearance of being a result-oriented opinion favoring the Bank.

Second, Justice Cearley, as counsel for the Bankers Association, represents the trade association to which most of the banks in this state belong. The Bank is a member of the Bankers Association. In the ordinary course of their business, all banks including the Bank make frequent use of pre-printed guaranty forms. A favorable decision interpreting language in such a guaranty to cut off or waive rights of borrowers from banks is extremely beneficial to the Bank and to the other members of the Bankers Association.

Third, in his Opinion Justice Cearley quotes extensively from the guaranty agreement finding it to be clear and unambiguous and finding it to be absolute and unconditional in its application. The Opinion further indicates that the wording of the guaranty effectively waives any defense pursuant to UCC § 3-606 which Griffin may raise based upon the Bank's impairment of collateral. If allowed to stand, the Opinion will have immediate and direct beneficial effect on the Bank, who is a member of the Bankers Association represented by Justice Cearley.

Fourth, and most significant, all members of the Bankers Association will reap substantial benefits due to the Court's approval of the language in the guaranty in question in this suit and the Opinion's favorable interpretation of UCC §3-606. Because of the direct benefit to Appellant, who is a member of the Bankers Association, and the indirect future benefit to all members of the Bankers Association, there is a clearly demonstrated appearance of impropriety and the lack of impartiality by virtue of Justice Cearley's participation in this appeal and his authorship the majority opinion.

Finally, even if it is shown that Justice Cearley had no knowledge of the membership of the Bank in the Bankers Association, there still is the appearance of the lack of impartiality and the appearance of impropriety. As counsel for the Bankers Association, Justice Cearley is charged with knowledge of its membership. When it became known to Justice Cearley that this case involved a bank and the interpretation of a guaranty form prepared by a bank using a pre-printed form, nagging questions as to the appearance of impartiality were present. The members of the public, as objective observers, can reach the reasonable conclusion that Justice Cearley knew or should have known that he represented the Bankers Association, that the Bank was a member of the Bankers Association, and that a reversal of the trial court's decision would be specifically beneficial to the Bank and generally beneficial to the Bankers Association. These matters mandate that Justice Cearley not participate in this appeal.

In *Liljeberg*, the United States Supreme court considered the Court of Appeals' decision vacating

a district court opinion due to the district judge's association with a university as a member on its board of trustees during a period of time when the petitioner and the university were engaged in negotiations. These negotiations related to a dispute later litigated before this judge. Addressing the district judge's lack of knowledge and applying 28 U.S.C. § 455, the Court emphasized that scienter is not an element of the violation of § 455 and stated that "the judge's lack of knowledge of a disqualifying circumstance may bear on the question of remedy, but it does not eliminate the risk that 'his impartiality might reasonably be questioned' by other persons." *Liljeberg*, 486 U.S. at 859. The Supreme Court recognized that the advancement of the purpose of the provision - to promote public confidence in the integrity of the judicial process - ... does not depend upon whether or not the judge actually knew facts creating an appearance of impropriety, so long as the public might reasonably believe that he or she knew. *Id.* at 860.

The United States Supreme Court further determined that, even though the district judge did not disqualify himself in the first instance because he is without knowledge of the conflict, that when he is made aware of the conflict as his impartiality is questioned, he should have disqualified himself at that time. These principles can be applied retroactively and a judge who is called upon to rectify an oversight can and should take the steps necessary to maintain public confidence in the impartiality of the judiciary. *Liljeberg* at 861. Under these circumstances, if a judge concludes that his impartiality might reasonably be questioned, more obvious instance when the judge's impartiality has

been questioned, then the judge should find that there has been a violation and he should rectify the situation. Id. As stated in *Liljeberg*, "to perform its high function in the best way 'justice must satisfy the appearance of justice.'" *Id.* at 864 (citation omitted).

*Liljeberg* applied essentially the same judicial standards which are at issue in this matter. In this case, there is ample basis for concluding that an objective observer could question Justice Cearley's impartiality. Accordingly, Justice Cearley should disqualify himself from further participation in this case.

This same issue was also examined by the United States Supreme Court in *Aetna Life Insurance Company v. Lavoie*, 475 U.S. 813 (1985). This case was originally filed in the State of Alabama and was eventually affirmed by the Alabama Supreme Court. Thereafter, appellant filed a timely application for rehearing. Before said application was acted upon, appellant learned that one of the justices of the Alabama Supreme Court had two similar actions pending in Alabama state courts against insurance companies alleging similar issues and damages. Appellant then filed two motions in the Alabama Supreme Court challenging that justice's participation in the decision and his continued participation in considering appellant's application for rehearing. The motions also alleged that all justices on the court should recuse themselves. These motions were denied, but the United States Supreme Court agreed to review the case on appeal. The Supreme Court held that the direct, personal, substantial and pecuniary interest of the Alabama Justice was sufficient to establish a violation of the

due process clause of the Fourteenth Amendment. The opinion of the Alabama Court held that the clear and immediate effect of enhancing both the legal status and settlement value of that justice's own pending case and the appearance of justice would best be served by vacating the judgment and remanding the case.

Of particular interest to this appeal is the concurring opinion of Justice Brennan who wrote that the Alabama justice's interests in the outcome of the case and his participation in its disposition violated due process. Resolution of the issues by the Alabama Supreme Court enhanced the viability and settlement of that justice's own lawsuit. Such an interest clearly required recusal. Neither, according to Justice Brennan, is it necessary to suggest that the outcome might be different had the Alabama justice not provided the necessary fifth vote. Justice Brennan believed that fact to be irrelevant writing that the Alabama justice's participation in the resolution of the case was sufficient in itself to impugn the decision. In his concurring opinion, Justice Brennan explained his conclusion as follows:

> The description of an opinion as being 'for the court' connotes more than merely that the opinion has been joined by a majority of the participating judges. It reflects the fact that these judges have exchanged ideas and arguments in deciding the case. It reflects the collective process of deliberation which shapes the court's perceptions of which issues must be addressed and, more importantly, how they must be

> addressed. And, while the influence of any single participant in this process can never be measured with precision, experience teaches us that each member's involvement plays a part in shaping the court's ultimate disposition. The participation of a judge who has a substantial interest in the outcome of a case of which he knows at the time he participates necessarily imports a bias into the deliberative process. This deprives litigants of the assurance of impartiality that is the fundamental requirement of due process.

*Aetna Life Insurance Co v. Lavoie*, 475 U.S. at 831. (Emphasis in original.)

Accordingly, the fact that the Opinion handed down on June 29,1992 was adopted by five of the seven participating Justices does not remedy the appearance of impropriety or the lack of impartiality on Justice Cearley's part. Justice Cearley should disqualify himself from further participation in this proceeding and the Court should vacate the June 29, 1992 Opinion.

Likewise, Griffin respectfully requests that this case be resubmitted and that the remaining Justices in this case each consider whether they should also withdraw from this case and allow the Governor to appoint an appropriate number of special justices to decide the case upon resubmission. This case was heard by this Court with three Special Justices appointed. Special Chief Justice Cearley authored the Court's Opinion in this case and the decision was not unanimous. Two dissents were also written. Specifically, Justice Glaze and Special Justice

Pinson each wrote dissenting opinions .

Under these circumstances, and consistent with the teachings of *Aetna v. Lavoie* and *Johnson v. Sturdivant, supra*, Griffin requests that each of the remaining Justices and Special Justices examine themselves to determine whether or not it would be most appropriate, in the interests of justice and in the interest of the appearance of justice, that they each step down and allow the Governor to appoint an appropriate number of special justices to decide this appeal. Consistent with the guidance of *Johnson v. Sturdivant*, Mr. Griffin recognizes that the decision of the remaining justices as to whether he should step aside is an individual one and suggests that the decision should be based upon whether the justice was influenced or whether there is the appearance that the justice was influenced by Justice Cearley's participation in the deliberative process which culminated with the June 29, 1992 Opinion.

IV.

The facts of this case mandate disqualification of Justice Cearley. Disqualification of Justice Cearley, however, does not fully address the situation. In order to place all parties in the position where they started before this matter surfaced, the June 29, 1992 Opinion should be vacated and set aside. Vacation of the June 29, 1992 Opinion is an appropriate remedy in this situation and is consistent with the remedies adopted by this Court in *Johnson v. Sturdivant*, 295 Ark. 622, 758 S.W.2d 415 (1988) and by the United States Supreme Court in *Liljeberg v. Health Services Acquisition Corporation*, 486 U.S. 847 (1988). In *Liljeberg*, the United States Supreme Court held:

We conclude that in determining

> whether a judgment should be vacated for a violation of Section 455(a) it is appropriate to consider the risk of injustice to the parties in the particular case, the risk that the denial of relief will produce injustice in other cases, and the risk of undermining the public's confidence in the judicial process. We must continuously bear in mind that "to perform its highest function in the best way 'justice must satisfy the appearance of justice.'" *In re: Murchison*, 349 US 133, 136 (1955) (citation omitted).

486 U.S. at 864

Likewise, the Arkansas Supreme Court in the *Johnson* opinion similarly approved the vacation of its previous opinion based on the following rationale:

> Finally, we have considered the reputation of this court and its meaning to those who come to us for judgment regarding their rights, privileges and liberties. While we are not expected to be a perfect institution, we are expected to always try to do the right thing. It is not easy to sit in judgment of one's self. Frankly, some of us believe we should remain in the case, others do not. Given the unavoidable choice of letting a decision stand under a cloud or removing the cloud entirely, we choose the latter. Considering all of the circumstances in this case, we have decided it would be in the best interest of all concerned for each of us to step aside and allow the

> governor to appoint seven special justices to decide the case. At least that way all Parties are where they started before this unfortunate matter surfaced.
>
> We therefore set aside our decision in this case. We will each notify the office of the governor of our recusal in accordance with the Arkansas Constitution.

758 S.W.2d at 416. (Emphasis supplied.)

In this case, the interests of the parties, the possibility of injustice to the litigants herein, and the need to preserve the public's confidence in the judicial process all mandate that the June 29, 1992 Opinion be vacated and set aside, and that this matter be resubmitted for consideration on such terms as this Court deems appropriate.

Therefore, based upon this information which has only now been obtained, and in consideration of the Code of Judicial Conduct, Appellee, Richard E. Griffin, respectfully submits that Special Chief Justice Cearley should disqualify himself from further participation in this proceedings, that the Opinion should be vacated, and that this entire case should be reheard. Of necessity, this disqualification would require each of the remaining justices to examine themselves to decide whether they were influenced by Justice Cearley's arguments during deliberations in deciding this appeal. See, *Johnson v. Sturdivant*, 758 S.W.2d at 416.

V.

There appears no other way to avoid the appearance of impropriety and to maintain the integrity of this honorable Court.

Respectfully Submitted,

RICHARD E. GRIFFIN

HOPKINS & JAMES, P.A.
1910 First Commercial Building
Little Rock, Arkansas 72201
Telephone (501) 375-1517
Facsimile (501) 375-0231

By: /s/
Gregory M. Hopkins
(Bar No. 81093)

Attorneys for Appellee
Richard E. Griffin

CERTIFICATE OF SERVICE

I, Gregory M. Hopkins, do hereby certify that a copy of the foregoing has been mailed, via first class mail, on this 24 day of August, 1992, to the following:

Tom Streetman, Esq.
Arnold, Hamilton & Streetman
302 Main Street
P.O. Drawer A
Crossett, Arkansas 71635

Honorable Russell Rogers
Arkansas County Courthouse
P.O. Box 365
Stuttgart, Arkansas 72160

/s/
Gregory M. Hopkins

SUPREME COURT OF ARKANSAS

FIRST NATIONAL
BANK OF CROSSETT,
CROSSETT, ARKANSAS APPELLANT

VS. NO. 91-65

RICHARD E. GRIFFIN APPELLEE

**AFFIDAVIT OF ALLEN CARNEY**

STATE OF ARKANSAS)
) ss .
COUNTY OF PULASKI)

I, Allen Carney, do hereby state on oath the following:

1. I am presently a summer law clerk with the Hopkins & James, P.A. I have been employed as a law clerk with this firm since May, 1992.

2. Recently I placed two telephone calls to the telephone number listed for the Arkansas Bankers Association in Little Rock, Arkansas. The two telephone calls were regarding whether Robert M. Cearley, Jr. had any relation with the Arkansas Bankers Association as attorney or counsel and whether First National Bank of Crossett, Arkansas, Appellant in an appeal before the Arkansas Supreme Court, Case No. 91-65, is a member of the Association.

3. In my first telephone call to the Arkansas Bankers Association I was transferred to someone who could answer my questions. I asked that person if the Arkansas Bankers Association had in-house

counsel or employed outside counsel. The person stated that the Arkansas Bankers Association does not have in-house counsel, but that Robert Cearley acted as adjunct counsel.

4. In my second telephone conversation with the Arkansas Bankers Association, the person who answered the phone confirmed that First National Bank of Crossett is a member of the Arkansas Bankers Association.

5. I hereby declare that all statements made herein of my own knowledge are true and that all statements are made on information and belief I believe to be true.

FURTHER AFFIANT SAYETH NOT.

Dated this 18th day of August, 1992

/s/
ALLEN CARNEY

SUBSCRIBED AND SWORN TO ME before this 18th day of August, 1992.

/s/
Carolyn Louise Fritts
NOTARY PUBLIC

My Commission Expires
11/11/2000
(SEAL)

**APPENDIX H**

IN THE SUPREME COURT OF ARKANSAS

FIRST NATIONAL BANK
OF CROSSETT,
CROSSETT, ARKANSAS — APPELLANT

V. — No. 91-65

RICHARD E. GRIFFIN — APPELLEE

APPEAL FROM
ASHLEY COUNTY CIRCUIT COURT
SECOND DIVISION

The Honorable Russell Rogers,
Circuit Judge on Assignment

APPELLEE RICHARD E. GRIFFIN'S
MOTION FOR DISQUALIFICATION,
TO VACATE DECISIONS,
AND FOR RESUBMISSION

Gregory M. Hopkins, Esq.
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Attorneys for Appellee

IN THE SUPREME COURT OF ARKANSAS

FIRST NATIONAL BANK
OF CROSSETT,
CROSSETT, ARKANSAS APPELLANT

V. No. 91-65

RICHARD E. GRIFFIN APPELLEE

**APPELLEE RICHARD E. GRIFFIN'S MOTION FOR DISQUALIFICATION, TO VACATE DECISIONS, AND FOR RESUBMISSION SUPREME COURT OF ARKANSAS**

Comes the Appellee, Richard E. Griffin ("Griffin"), and for his Motion states:

I. Procedural History.

1. On June 29, 1992, this Court entered its Opinion (the "Opinion") in the above matter reversing and remanding the trial judge's decision. Two Justices dissented from the Opinion.

2. On July 16, 1992, Appellee filed a Petition for Rehearing (the "Rehearing Petition") addressing several substantive issues.

3. On August 24, 1992, after learning certain facts, Appellee filed a Motion to Suggest Disqualification and to Vacate Opinion (the "Disqualification Motion"). Appellee established by uncontroverted Affidavit that Special Chief Justice Robert M. Cearley, Jr. ("Special Justice Cearley"), who authored the Opinion, had a substantial conflict of interest which was not disclosed and which prevented him from rendering an impartial decision.

4. On September 28, 1992, the Clerk of the Court issued two Letter Orders stating that the Rehearing Petition and the Disqualification Motion had been denied (the "Letter Orders"). Copies of the Letter Orders are attached as Exhibits A and B, respectively, and are incorporated by reference. The Letter Orders are the subject of this Motion.

5. It was unclear from the Letter Orders whether Special Justice Cearley participated in the Court's determination represented by the Letter Orders. Thus, the Clerk of this Court was subsequently contacted and the procedure concerning the participation of special justices in the Motions was determined. Attached hereto as Exhibit C and incorporated by reference is a letter from counsel's office setting forth the procedure. Special Justice Cearley apparently did participate in the decisions.

II. Separate Motion for Disqualification, to Vacate Decision, and for Resubmission.

6. Appellee files this Motion for Disqualification, to Vacate Decisions, and for Resubmission as to the September 28, 1992 Letter Orders due to Special Justice Cearley's participation in decisions denying the Rehearing Petition and the Disqualification Motion.

7. In rendering its original Opinion, the other Justices apparently had no notice or knowledge of Special Justice Cearley's conflicts. However, these matters were brought before the Court in the Disqualification Motion. Despite this, Special Justice Cearley participated in both the denial of the Rehearing Petition and the Disqualification Motion. This participation was improper.

8. Appellee respectfully submits that Special

Justice Cearley's participation in this case has become so pervasive that it mandates the recusal of the entire Court. Even after Special Justice Cearley's conflict was identified he was allowed to continue to participate in the case. There is now no way to determine the extent of his influence or the full effect of his bias on the other Justices.

9. Upon the disqualification of Special Justice Cearley and the recusal of the panel, it follows that all decisions of the Court and the Opinion should be vacated for the following reasons:

a) Special Justice Cearley's participation in the case and in authoring the Opinion constituted a violation of due process as mandated by the Fifth and Fourteenth Amendments to the United States Constitution and 42 U.S.C. § 1983.

b) Special Justice Cearley's participation in this case and in authoring the Opinion constituted a violation of Article VII, Section 20 of the Constitution of Arkansas and Ark. Code Ann. § 16-11-108.

c) Special Justice Cearley's participation in the case and in authoring the Opinion constituted a violation of Canons 2 and 3 of the Arkansas Code of Judicial Conduct.

III. Request for Oral Argument.

10. Appellee respectfully requests oral argument for the matters raised in this Motion for Disqualification, to Vacate Decisions, and for Resubmission.

BRIEF IN SUPPORT OF MOTION

I. Factual events establishing conflict of Special Justice Cearley.

The following factual events establish the conflict

of Special Justice Cearley: Appellant, First National Bank of Crossett, (the "Bank") is a member of the Arkansas Bankers Association (the "Bankers Association").

2. At all times relevant Special Justice Cearley served as counsel for the Bankers Association.

3. The issues presented by this appeal involve the interpretation of a written guaranty agreement prepared by the Bank and executed by Griffin. The guaranty agreement was prepared by the use of a pre-printed form of a type routinely used by banks and other financial institutions.

4. The Opinion reversed the trial court's decision in favor of Griffin. The Opinion contains interpretations of the guaranty agreement and of the Uniform Commercial Code (the "UCC") § 3-606 which are directly beneficial to the Bank and indirectly favorable and beneficial to all of the members of the Bankers Association.

5. The issues which were decided in favor of the Bank in the Opinion involve questions of law and contract interpretation which foreseeably will arise in the future and will involve members of the Bankers Association. Specifically, this appeal addresses issues relating to a guarantor's ability to limit liability in a written guaranty agreement and a bank's ability to have a guarantor to waive in advance certain rights, including defenses based upon UCC § 3-606, by inclusion of language in a pre-printed guaranty form.

6. At no time, either prior to his authoring the Opinion or thereafter, did Special Justice Cearley disclose his representation of the Bankers Association and that the Bank is a member of the Bankers Association. At the time the Opinion was

rendered, Griffin was unaware of Cearley's representation of the Bankers Association. Griffin only learned of these facts subsequent to filing his Rehearing Petition.

The above facts provide the basis for this Motion.[1] Factual allegations of this type in a motion for recusal or disqualification must be taken as true. *United States v. Trevithick*, 526 F.2d 838, 839 (8th Cir. 1975).

II. Legal Argument.

A. Special Justice Cearley's interest in the outcome of the case and his participation in its disposition violated due process.

Special Justice Cearley's participation in this case, in light of the appearance of impropriety and appearance of a lack of impartiality, was a conflict which violated Appellee Griffin's right to due process guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution. *See Aetna Life Insurance Company v. Lavoie*, 475 U.S. 813 (1985)(Alabama's interest in outcome of the case and judge's participation in the disposition violated due process). Further, these acts were performed under color of law in contravention of 42 U.S.C. § 1983.

Appellee's right to due process is also being violated by the lack of an established procedure to determine the full scope and extent of the conflict of Special Justice Cearley. There is no established procedure to determine vital questions which would further impact upon Special Justice Cearley's conflict. The full extent or impact of Special Justice

---

[1] Appellee incorporates by reference the factual allegations, exhibits, and legal arguments contained in the Motion to Suggest Disqualification and to Vacate Opinion filed on August 24, 1992.

Cearley's conflict upon the Court's actions in this case can never be accurately determined. Further, rather than addressing this matter fully and directly in written form, the Court merely directed that a brief Letter Order from the Clerk of the Court be sent informing the parties that the Disqualification Motion was denied.

It is clear that a violation of the Fourteenth Amendment occurs where a person's liberty or property is the subject of a judgment of a court in which the judge has a direct, personal, substantial, pecuniary interest in reaching a conclusion against him in his case." *Aetna Life Insurance Company v. Lavoie*, 475 U.S. 821-822 (1985), *quoting Tumey v. Ohio*, 273 U.S. 510, 523 (1927). The test as to whether the due process clause has been violated can be best stated as follows:

> [Whether the] situation is one which would offer a possible temptation to the average judge to lead him not to hold the balance nice, clear and true (citations omitted).

*Aetna* at 475 U.S. 822, 825 (quoting *Ward v. Village of Monroeville*, 409 U.S. 57, 60 (1972)). Clearly, the above standard has been violated in this case.

The participation of Special Justice Cearley, who knew at the time he participated in this case that he had a substantial interest its outcome, necessarily imported a bias into the deliberative process. "This deprived litigants of the assurance of impartiality that is the fundamental requirement of due process." *Aetna*, 475 U.S. at 831.

B. Special Justice Cearley's participation in the case constitute a violation of Article VII. Section 20 of the Constitution of Arkansas.

Article VII, Section 20 of the Constitution of Arkansas provides as follows:

> **§ 20. Disqualification of Judges - Grounds.** No judge or justice shall preside in the trial of any cause in the event of which he may be interested, or where either of the parties shall be connected with him by consanguinity or affinity, within such degree as may be prescribed by law; or in which he may have been of counsel or have presided in any inferior court (emphasis added).

A similar provision is also found at Ark. Code Ann. § 16-11-108.

Appellee respectfully submits that Special Justice Cearley had an interest in the outcome of the case and that his participation in the case constituted a violation of the Constitution of Arkansas and Arkansas statute. Special Justice Cearley had a pecuniary interest in the outcome of the case in light of his role as counsel for the Bankers Association. In *Ferrell v. Keel*, 103 Ark. 96, 146 S.W. 494 (1912), the Court ruled that a Justice of the Supreme Court was disqualified in decisions where his salary was involved. In addressing the degree of interest which could result in disqualification, the Court stated:

> The question of the amount of the interest of a judge in the litigation is not material. It must be direct, and not too remote; but if he has an interest, however small, he is disqualified. The Constitution does not undertake to measure the extent of the interest which disqualifies, but declares in plain terms

> that no judge or justice shall preside in the trial of any cause "in the event of which he may be interested." The Supreme Court of Massachusetts, speaking on this particular phase of the question, said: "Nor does it make any difference that the interest appears to be trifling; for the minds of men are so differently affected by the same degrees of interest that it has been found impossible to draw a satisfactory line. Any interest, therefore, however small, has been held sufficient to render a judge incompetent." *Pierce v. Atwood*, 13 Mass. 324 (emphasis added).

*Ferrell*, 146 S.W. at 495.

It is clear that Special Justice Cearley had an interest in the outcome of the case. The dispute was over a preprinted form used by banks throughout the State of Arkansas. The Appellant was a member of the Arkansas Bankers Association. Special Justice Cearley is, and at all times relevant was, counsel for the Arkansas Bankers Association which had a vested interest in the outcome of litigation concerning preprinted forms and the interpretation of the UCC. The parties can argue as to how large or small of an interest, but the fact remains there was an interest. Special Justice Cearley should be disqualified.

C. Violation of Arkansas Code of Judicial Conduct.

For the reasons stated in Appellee's Motion to Suggest Disqualification and to Vacate Opinion filed August 24, 1992, it is clear that Special Justice Cearley's participation in this case violates both

Canons 2 and 3 of the Arkansas Code of Judicial Conduct. These arguments are realleged and incorporated by reference.

III. Remedies.

In light of Special Justice Cearley's conflict of interest, Appellee respectfully submits that the entire Court must disqualify itself and all decisions and Opinions should be vacated. A substantial conflict exists which has not been reconciled with the constitutional and statutory requirements of impartiality. Special Justice Cearley authored an Opinion in what was clearly a hotly contested case drawing strong dissents. Appellee has no means to discover the full extent of Special Justice Cearley's influence on the whole Court or the impact of his bias. It is clear that Appellee's due process rights have been violated as a result of this conflict. Even after the conflict was brought to the Court's attention, Special Justice Cearley was allowed to continue to participate in the decisions of the Court involving the disposition of this case.

In light of the above facts, all decisions of this Court involving this case should be vacated and a new panel should be appointed.

IV. Conclusion.

Special Justice Cearley's participation in this case violated the mandates of due process as required by the United States Constitution, 42 U.S.C. § 1983, the Constitution of Arkansas, Arkansas statutes, and the Arkansas Code of Judicial Conduct. Appellee respectfully submits that the Court should grant this Motion for Disqualification, to Vacate Decisions, and for Resubmission and that a new panel should be appointed to resolve this appeal.

HOPKINS & JAMES, P.A.
1910 First Commercial Building
Little Rock, Arkansas 72201
Telephone (501) 375-1517

By: /s/
Gregory M. Hopkins (#81093)

CERTIFICATE OF SERVICE

I, Gregory M. Hopkins, do hereby certify that a copy of the foregoing has been mailed on this 14th day of October, 1992, to the following:

Tom Streetman, Esq.
Arnold, Hamilton & Streetman
302 Main Street
P.O. Drawer A
Crossett, Arkansas 71635

Honorable Russell Rogers
Arkansas County Courthouse
P.O. Box 365
Stuttgart, Arkansas 72160

/s/
Gregory M. Hopkins

Office of The Clerk
Supreme Court of The State of Arkansas
Arkansas Court of Appeals
Justice Building
625 Marshall Street
Little Rock, AR 72201

September 28, 1992

Gregory M. Hopkins
Attorney at Law
1910 First Commercial Building
Little Rock, AR 72201

RE: 91-65 First National Bank of Crossett, Crossett, Arkansas v. Richard E. Griffin

Dear Mr. Hopkins:

The Supreme Court made the following order in the above styled case today:

"Petition for Rehearing is denied. Glaze, J. and Special Justice Jerry Pinson would grant. Holt, C.J., and Dudley and Brown, JJ., not participating."

Sincerely yours,

/s/

Leslie W. Steen, Clerk

LWS:rh
cc: Thomas S. Streetman
Bob Rush, Clerk
(#87-245-2)

Office of The Clerk
Supreme Court of The State of Arkansas
Arkansas Court of Appeals
Justice Building
625 Marshall Street
Little Rock, AR 72201

September 28, 1992

Gregory M. Hopkins
Attorney at Law
1910 First Commercial Building
Little Rock, AR 72201

RE: 91-65 First National Bank of Crossett, Crossett, Arkansas v. Richard E. Griffin

Dear Mr. Hopkins:

The Supreme Court made the following order in the above styled case today:

"Appellee's motion to suggest disqualification and to vacate opinion is denied. Holt, C.J., and Dudley and Brown, JJ., not participating."

Sincerely yours,
/s/
Leslie W. Steen, Clerk

LWS:rh
cc: Thomas S. Streetman

HOPKINS & JAMES, P.A.
Attorneys At Law
1910 First Commercial Building
Little Rock, Arkansas 72201
Telephone (501) 375-1517
Facsimile (501) 375-0231 (24 Hours)

October 7, 1992

Mr. Leslie W. Steen, Clerk HAND DELIVERY
Office of the Clerk
Supreme Court of the State of Arkansas
Justice Building
625 Marshall Street
Little Rock, AR 72201

RE: 91-65 First National Bank of Crossett, Crossett, Arkansas vs. Richard E. Griffin

Dear Mr. Steen:

This letter is to confirm my conversations with you and other members of your office on Tuesday, October 6, 1992. In those conversations, I asked about the Court's voting procedure on Petitions for Rehearing and Motions filed in cases which Special Justices participated in the opinion.

You explained to me that copies of the petition or motion are mailed to the Special Justices with instructions for them to call the Court with their vote. In the event that a Judge does not call in his vote, a notation that the Special Justice did not

participate in the determination on the pending petition or motion is made on the letter order sent to counsel representing the parties in the matter. If no such notation is made on the letter sent to counsel, then it is assumed that the Special Justice voted on the motion or petition pending in the case.

In the above-referenced matter, it is my understanding that there is no written opinion, only a notation which is entered on the Court's docket and the letter orders which were mailed to the parties' counsel, copies of which are attached. Neither of the letters, sent to counsel in this case contain any notation that a Special Justice did not participate in the matters pending before this Court. Accordingly, based upon established Court procedures, each Special Justice voted on, and participated in determining, the outcome of the issues raised in these pleadings.

If this letter does not accurately reflect this Court's procedure for a Special Justice's participation in decisions on motions and petitions filed subsequent to the opinion rendered in a case, or if I have misunderstood any of the Court's procedure, or if there are additional matters which should be called to my attention in order better understand how this Court addresses this situation, please let me know. Thank you for your assistance in this matter.

Sincerely,

/s/
Jana L. Blair

JLB:ced
Enclosure

Supreme Court, U.S.
FILED
JAN 13 1993
OFFICE OF THE CLERK

2

No. 92-1135

In The

# Supreme Court of the United States

October Term, 1992

RICHARD E. GRIFFIN,

*Petitioner,*

v.

FIRST NATIONAL BANK OF CROSSETT, CROSSETT, ARKANSAS,

*Respondent.*

**Petition For Writ Of Certiorari To The Supreme Court Of Arkansas**

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

THOMAS S. STREETMAN
*Counsel of Record for Respondent*
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COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

## LIST OF ALL PARTIES TO THE PROCEEDING BELOW

1. Richard E. Griffin Petitioner

2. First National Bank of Crossett, Crossett, Arkansas, Respondent. First National Bank of Crossett is wholly owned by Ashley Bancstock Company, a one bank holding company of Crossett, Arkansas.

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No. 92-1135

In The

# Supreme Court of the United States

October Term, 1992

RICHARD E. GRIFFIN,

*Petitioner,*

v.

FIRST NATIONAL BANK OF CROSSETT,
CROSSETT, ARKANSAS,

*Respondent.*

**Petition For Writ Of Certiorari**
**To The Supreme Court Of Arkansas**

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

## INTRODUCTORY STATEMENT

Petitioner seeks writ of certiorari to the Arkansas Supreme Court based on an alleged violation of his procedural due process rights. This Court's jurisdiction for certiorari is governed by *Sup. Ct. Rule* 10. Petitioner asserts that his rights to procedural due process were violated because of Special Chief Justice Robert Cearley's participation in this case. That issue was not raised until

two months after the Arkansas Supreme Court decided the case adversely to petitioner.[1]

In the fall of 1991, Arkansas Governor Bill Clinton appointed three special justices, including Special Chief Justice Cearley, to sit in this case to replace three regular justices who had recused.[2] The case was argued orally to the court on April 13, 1992, and was under submission after that date. The opinion was issued on June 29, 1992. By a vote of 5-2, the court reversed and remanded the case to the trial court. Justice Cearley wrote the majority opinion.

Petitioner filed his motion for recusal on August 24, 1992. The Arkansas Supreme Court rules require motions for recusal to be filed a reasonable time before submission of the case.[3] Petitioner did not timely seek recusal. After the Arkansas court issued its opinion, Petitioner states he conducted a "brief but necessary" investigation and learned of a possible connection between Special

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[1] The case was decided on June 29, 1992. Petitioner's Appendix A, page 1a. Petitioner filed for recusal on August 24, 1992. Petitioner's Appendix G, page 54a.

[2] Special Associate Justices Miller and Pinson were appointed on October 4, 1991, and Special Chief Justice Cearley was appointed on December 16, 1991. Respondent's Appendix A, B and C; pages 1a, 3a, and 5a.

[3] Rule 27, *Rules of Arkansas Supreme Court* provides:

> Whenever it is desired to suggest the disqualification of a Judge of this Court in a case to be submitted, the attorney so desiring shall present the matter to the Court in consultation a reasonable time before the day of submission of the case.

Chief Justice Cearley and the Arkansas Bankers Association (the Association). Petitioner waited to file his motion for recusal until after the case had been decided. Had he been successful, he would have done nothing.

Petitioner's motion for recusal was solely based on a self-serving, hearsay affidavit by an employee of his counsel. The motion alleged that Special Chief Justice Cearley should not have participated in this case because he had served as adjunct counsel to the Association, and Justice Cearley and the Association would somehow benefit from the decision. There was no evidence to support Petitioner's motion to recuse other than the affidavit. At most, the affidavit alleges a past relationship between Justice Cearley and the Association, which was not a party to the litigation. The affidavit does not establish that Justice Cearley, or the Association, would receive a substantial, personal, direct and pecuniary benefit from the decision. Any benefit to either Justice Cearley or the Association is based on sheer speculation and conjecture.

The writ of certiorari should be denied because (1) Justice Cearley did not receive a direct, personal, substantial and pecuniary benefit from the decision; (2) Justice Cearley's vote was not crucial in the 5-2 vote to reverse and remand; and (3) the motion to recuse was not timely filed.

## PROCEDURAL HISTORY

Petitioner, a practicing attorney for over 25 years, is the Chairman of the Board of First State Bank of Crossett,

Arkansas. Respondent is the other bank in Crossett. Petitioner induced Respondent to lend Bearhouse, Inc. $490,000.00 on May 1, 1986. Petitioner owned a 25% interest in Bearhouse and guaranteed 25% of the Bearhouse loan. A few months after Respondent made the loan, Bearhouse closed and was placed in an involuntary bankruptcy. Bearhouse defaulted on the loan, and Petitioner refused to honor his obligation under the guaranty. Respondent sued Petitioner on the guaranty. Respondent has attempted for over five years to recover the full amount that Petitioner owes, and for more than five years, Petitioner has successfully evaded his obligation under the guaranty. With the filing of this petition, *the odyssey continues.*

On August 20, 1990, the Circuit Court of Ashley County, Arkansas entered judgment in favor of Respondent against Petitioner for $17,000.00. Respondent timely perfected an appeal to the Arkansas Supreme Court, where the case was docketed on March 19, 1991. After the three special justices were appointed, the parties argued the case orally to the Arkansas Supreme Court on April 13, 1992.[4] The case was under submission to the court until its decision on June 29, 1992.

On July 16, 1992, Petitioner filed a petition for rehearing, which was denied. In that petition, Petitioner did not question the propriety of Special Chief Justice Cearley serving on the court. On August 24, 1992, Petitioner filed

---

[4] Petitioner erroneously states at page 9 of his brief that the case was orally argued on April 13, 1991.

his motion for recusal. In support of his motion, Petitioner attached only an affidavit of Allen Carney,[5] an employee of Hopkins & James, counsel for Petitioner. Carney stated that he placed two telephone calls to the Association and talked to an unidentified source who told him that Special Chief Justice Cearley acted as "adjunct counsel."[6] Carney also stated that a second unidentified person confirmed that Respondent was a member of the Association.

On September 28, 1992, the Arkansas Supreme Court denied Petitioner's motion for recusal. On that same date, the clerk of court issued a Mandate[7] remanding the case to the Ashley Circuit Court. The case is now pending in the trial court. Petitioner then filed a motion to recall the Mandate, which was also denied.[8]

After the case was reversed and remanded to the trial court, Petitioner again filed a motion in the Arkansas Supreme Court requesting all members of the court to recuse and to vacate its prior decision. That motion was filed in the Arkansas Supreme Court in spite of the fact that the case had been remanded to the trial court and

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[5] Carney's affidavit appears at page 70a of Petitioner's appendices.

[6] It is not clear from the affidavit what is meant by "adjunct counsel" nor the time frame in which Special Chief Justice Cearley had supposedly acted as adjunct counsel to the Association.

[7] The Mandate was issued on September 28, 1992 and filed with the Ashley Circuit Court on September 29, 1992. A copy of the Mandate appears at page 23a of Petitioner's appendices.

[8] See Petitioner's Appendix C, page 23a.

was no longer pending before the Arkansas Supreme Court. That motion was denied on November 4, 1992.[9]

## ARGUMENT

### 1. Justice Cearley Did Not Receive A Direct, Personal, Substantial and Pecuniary Benefit From The Decision.

This Court has held that in only the most extreme cases of bias and prejudice is disqualification of a judge constitutionally required. *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813 (1986). In a footnote in *Aetna*,[10] Chief Justice Burger pointed out that more is required than the slightest pecuniary interest in the outcome to raise due process issues. The footnote concludes with this statement:

> "We therefore follow *Ward v. Village of Monroeville*, 409 U.S. 57, 60, 93 S.Ct. 80, 83, 34 L. Ed. 2d 267 (1972), and decline to read *Tumey* [*Tumey v. Ohio*, 273 U.S. 510 (1927)] as constitutionalizing any rule that a decision rendered by a judge with 'the slightest pecuniary interest' constitutes a violation of the Due Process Clause."

The petition now before this Court is premised on the mistaken conclusion that Special Chief Justice Cearley regularly acts as counsel for the Association and the Association will benefit from the court's decision. The only evidence that Justice Cearley is, or was, counsel for the Association is based upon the affidavit of a paid

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[9] See Petitioner's Appendix C, page 23a.

[10] 475 U.S. 813, 825-826.

summer employee of Hopkins & James, counsel for Petitioner. That affidavit is based on alleged conversations with unidentified employees of the Association. Based on that affidavit alone, Petitioner seeks to disqualify Special Chief Justice Cearley and the entire panel. The integrity of the justices of the Arkansas Supreme Court should not be impugned based on a hearsay affidavit of a summer law clerk.

In *Aetna*, this Court stated that recusal is constitutionally required only under limited circumstances.[11] Specifically, this Court observed:

> The Court has recognized that not '[a]ll questions of judicial qualification . . . involve constitutional validity. Thus, matters of kinship, personal bias, state policy, remoteness of interest, would seem generally to be matters merely of legislative discretion.' (citations omitted)
>
> . . .
>
> We need not decide whether allegations of bias or prejudice by a judge of the type we have here would ever be sufficient under the Due Process Clause to force recusal. Certainly only in the most extreme of cases would disqualification on this basis be constitutionally required, and appellant's arguments here fall well below that level. . . . Appellant's allegations of bias and prejudice on this general basis, are insufficient to establish any constitutional violation.[12]

---

[11] 475 U.S. 813, 820-822.

[12] *Id.*

The *Aetna* court then concluded that the Due Process Clause is only violated when the judge has a "direct, personal, substantial, pecuniary interest" in the case.[13] Here, Petitioner claims Justice Cearley was disqualified because of his relationship to the Association. The Association is not a party to this suit. It has nothing at stake in this litigation. Petitioner has not established that either Justice Cearley or the Association has a direct, substantial, pecuniary interest in the outcome.

At page 11 of his brief, Petitioner alleges "at all times relevant to the Arkansas appellate proceedings, Special Chief Justice Cearley served as counsel for the Association." There is no evidence of that. Based on his telephone conversation with some unidentified person, Carney stated "that Robert Cearley acted as adjunct counsel."[14] The affidavit was stated in the past tense and gave no time reference. Even assuming the statement is accurate, one can only conclude that at some point in the past, Justice Cearley may have acted as adjunct counsel to the Association. There is no evidence that he was then acting as adjunct counsel or would act in the future as adjunct counsel to the Association. Any possible benefit to him or the Association would be remote and based on speculation and conjecture.

Petitioner also claims the guaranty form in question was "routinely used by banks and other financial institutions."[15] There is no evidence to support that conclusion.

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[13] 475 U.S. 813, 822.

[14] See Petitioner's Appendix F, page 53a.

[15] Brief, page 11.

There was no evidence at the trial of this case that the guaranty form was used by any bank other than Respondent. Even if that allegation were true, it fails to establish a direct, substantial benefit to either Justice Cearley or the Association.

Petitioner also contends the opinion by Special Chief Justice Cearley contained interpretations of the guaranty agreement which will indirectly benefit all members of the Association.[16] Even a cursory reading of the opinion illustrates the fallacy of that conclusion. Petitioner's primary defense at trial, and on appeal, was that Respondent impaired the collateral securing the Bearhouse loan. The court disposed of that argument in one paragraph based on its prior case of *Myers v. First State Bank of Sherwood*, 293 Ark. 82, 732 S.W.2d 459 (1987) which held that impairment of collateral defense does not apply to one who executes a separate guaranty. Justice Cearley and the majority did not create new law which benefited Respondent or the Association. They simply followed prior precedents and the law established by *Ark. Stat. Ann.* § 85-3-606, now *Ark. Code Ann.* § 4-3-605.

In his petition to this Court, Petitioner contends that both Respondent and the Association benefited from the court's interpretation of the guaranty agreement itself. Respondent expects to benefit from the decision. The fact that Respondent may benefit from the decision is immaterial to the petition. There is no evidence that the Association will benefit from the decision. The Arkansas court simply relied on *Lindell Square Ltd. Partnership v. Savers*

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[16] Brief, page 11.

*Fed. Sav. & Loan Ass'n*, 27 Ark. App. 66, 76, 767 S.W.2d 41, 47 (1989) which held that a guarantor's liability is in addition to and independent of other security so that any recourse against collateral is in addition to the rights against the guarantor. The court's opinion neither created new law nor changed existing law.

Petitioner suggests at page 14 of his brief that "if the opinion is allowed to stand, all members of the Bankers Association will reap substantial benefits due to the Arkansas court's approval of the language in the guaranty in question in this suit and the opinion's favorable interpretation of Section 3-606 of the Arkansas Uniform Commercial Code." This statement is inaccurate because, as noted above, the court's decision did not change the law but simply followed the precedent of *Lindell Square Ltd. Partnership v. Savers Fed. Sav. & Loan Ass'n, supra,* and *Myers v. First State Bank of Sherwood, supra.*

In support of his contention that he was denied due process, Petitioner relies principally on *Aetna, supra,* and *Liljeberg v. Health Service Acquisition Corp.*, 486 U.S. 847 (1988). Neither case is factually on point. In *Aetna,* this court vacated and remanded the judgment of the Supreme Court of Alabama where an Alabama justice had a *direct* interest in the outcome of the case. There, Justice Embry of the Alabama Supreme Court received $30,000.00 in settlement of a suit which was based on bad faith failure to pay a claim. That settlement came after he had authored an opinion dealing with the circumstances under which an insurance company may be liable for compensatory and punitive damages for bad faith failure to pay a claim. His personal case was pending before an Alabama trial court at the same time he wrote the opinion

of the Alabama Supreme Court. He had a *direct* interest in the outcome of the opinion he authored. This court concluded:

> "We hold simply that when Justice Embry made that judgment, he acted as *'a judge in his own case.'* (citations omitted) (emphasis supplied)
>
> . . .
>
> We also hold that his interest was 'direct, personal, substantial [and] pecuniary.' "[17] (citations omitted)

There is no evidence that Justice Cearley was ever involved in any case, either personally or as counsel, which involved the same issues as in this case. Justice Cearley did not act as "a judge in his own case." There is no evidence that he received a "direct, personal, substantial and pecuniary" benefit from the opinion he wrote.

The facts in *Liljeberg, supra,* are far different from the facts in the present case. In *Liljeberg,* the district judge was on the board of directors of an institution that had a material interest in the outcome of the litigation pending before the district court. This court held that the trial judge was required to recuse under 28 U.S.C. § 455(a), a statute that does not apply to state judges. Even if this Court assumes that Justice Cearley acts as adjunct counsel to the Association, there is no evidence to establish that either Justice Cearley or the Association had any material interest in the outcome of this litigation.

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[17] 475 U.S. 813, 824.

Petitioner has failed to establish that Justice Cearley had a material interest in, or received a substantial benefit from, the opinion. The petition should be denied. Otherwise, counsel will seek to vitiate the opinion of every appointed state court justice on some perceived conflict of interest.

Petitioner further requests the Court to vacate the opinion and disqualify the entire panel from sitting on this case. However, in *Aetna*, this Court did not disqualify the entire panel. There, in dismissing appellant's contention that the entire panel should be disqualified, this Court stated:

> Appellant has challenged not only the participation of Justice Embry in this case but also the participation of all the other justices of the Alabama Supreme Court . . . claiming that they also have an interest in this case. Such allegations do not constitute a sufficient basis for requiring recusal under the Constitution.
>
> . . .
>
> More important, while these justices might conceivably have had a slight pecuniary interest, [] we find it impossible to characterize that interest as 'direct, personal, substantial, [and] pecuniary.'[18] (citations omitted)

Petitioner does not allege any compelling constitutional basis for disqualifying all members of the Arkansas Supreme Court. There is no evidence that those justices had a direct, substantial and pecuniary interest in the

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[18] 425 U.S. 813, 825.

outcome of this case. The suggestion that they are disqualified to serve lacks any constitutional merit.

### 2. Justice Cearley's Vote Was Not Crucial To The Decision.

The Arkansas justices voted 5 to 2 to reverse and remand this case. Justice Cearley voted with the majority. However, if Justice Cearley had not participated in the case, the case would have been reversed based on a 4 to 2 vote. This court emphasized in *Aetna*[19] that Justice Embry cast the deciding vote and authored the opinion. Here, although he did author the opinion, Justice Cearley did not cast the deciding vote. The court should not vacate the opinion because Justice Cearley's vote was not crucial to the outcome.

### 3. Petitioner Failed To Timely Request Recusal.

This case was docketed in the Arkansas Supreme Court on March 19, 1991. Governor Clinton appointed the three special justices in the fall of 1991. The case was argued orally on April 13, 1992. The case was decided on June 29, 1992. Petitioner filed his first motion for recusal on August 24, 1992. Rule 27, *Arkansas Rules of Supreme Court*, provides:

> Whenever it is desired to suggest the disqualification of a judge of this court in a case to be submitted, the attorney so desiring shall present

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[19] 425 U.S. 813, 822-823.

> the matter to the court in consultation ***a reasonable time before the day of submission of the case***. (emphasis supplied)

Petitioner did not request recusal within a reasonable time before the case was submitted. Likewise, Petitioner did not explain why he waited until after the decision to conduct his investigation.

Petitioner states at page 10 of his brief that after a "brief" investigation, he filed his motion to suggest disqualification and to vacate opinion. Petitioner gives no reason for waiting over eight months after Special Chief Justice Cearley was appointed to conduct his "brief but necessary investigation." The letter from Governor Clinton to Special Chief Justice Cearley reflects that Cearley is a practicing attorney in Little Rock, as is counsel for Petitioner. The trial transcript establishes that Petitioner is a banker and practicing attorney with 28 years experience. In spite of these facts, absolutely no reason is given for waiting until after the case was decided to conduct the investigation.

Petitioner failed to timely seek recusal.

## CONCLUSION

A judge is not constitutionally disqualified from serving if the judge's interest in the case is only slight or remote. To be constitutionally suspect, the interest must be "direct, personal, substantial [and] pecuniary."[20] The

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[20] 475 U.S. 813, 822.

facts in this case fall far short of that. The petition should be denied.

Respectfully submitted,

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Telephone: (501) 364-2213
*Counsel for Respondent,*
*First National Bank Of*
*Crossett*

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## APPENDIX A

(SEAL)

STATE OF ARKANSAS
OFFICE OF THE GOVERNOR
*State Capitol*
*Little Rock 72201*

Bill Clinton
*Governor*

(Filed OCT 10, 1991)

October 4, 1991

William S. Miller
1400 Union Bank Building
Little Rock, AR 72201

RE: 91-65. First National Bank of Crossett v. Richard E. Griffin.

Dear William:

Associate Justice Robert Brown has disqualified himself in the above-styled matter. As a result, I am privileged to appoint you Associate Justice to hear and participate in the decision of this specific case.

I am enclosing herewith your commission and a duplicate oath form. The oath must be executed and returned within fifteen (15) days after issuance to the Secretary of State's Office, State Capitol Building, Little Rock, Arkansas 72201.

Thank you very much for your willingness to serve in this capacity.

Sincerely,

/s/ Bill Clinton
Bill Clinton

BC:pg

Enclosures

cc: The Honorable Jack Holt, Jr.,
Chief Justice
The Honorable Don Corbin,
Associate Justice
The Honorable Steele Hays,
Associate Justice
The Honorable David Newbern,
Associate Justice
The Honorable Tom Glaze,
Associate Justice
The Honorable Bob Brown,
Associate Justice
The Honorable Robert Dudley, Associate Justice
Les Steen, Clerk

## APPENDIX B

(SEAL)

STATE OF ARKANSAS
OFFICE OF THE GOVERNOR
*State Capitol*
*Little Rock 72201*

Bill Clinton
*Governor*

(Filed OCT 10, 1991)

October 4, 1991

Jerry D. Pinson
P.O. Box 1111
Harrison, AR 72601

Re: 91-65. First National Bank of Crossett v. Richard E. Griffin.

Dear Jerry:

Associate Justice Robert Dudley has disqualified himself in the above-styled matter. As a result, I am privileged to appoint you Associate Justice to hear and participate in the decision of this specific case.

I am enclosing herewith your commission and a duplicate oath form. The oath must be executed and returned within fifteen (15) days after issuance to the Secretary of State's Office, State Capitol Building, Little Rock, Arkansas 72201.

Thank you very much for your willingness to serve in this capacity.

Sincerely,

/s/ Bill Clinton
Bill Clinton

BC:pg

Enclosures

cc: The Honorable Jack Holt, Jr.,
Chief Justice
The Honorable Don Corbin,
Associate Justice
The Honorable Steele Hays,
Associate Justice
The Honorable David Newbern,
Associate Justice
The Honorable Tom Glaze,
Associate Justice
The Honorable Bob Brown,
Associate Justice
The Honorable Robert Dudley,
Associate Justice
Les Steen, Clerk

## APPENDIX C

(SEAL)

STATE OF ARKANSAS
OFFICE OF THE GOVERNOR
*State Capitol*
*Little Rock 72201*

Bill Clinton
*Governor*

(Filed DEC 18, 1991)

December 16, 1991

Robert Cearley
221 W. 2nd Street
Little Rock, AR 72201

Re: 91-65. First National Bank of Crossett v. Richard E. Griffin.

Dear Bob:

Chief Justice Jack Holt, Jr., has disqualified himself in the above-styled matter. As a result, I am privileged to appoint you Special Chief Justice to hear and participate in the decision of this specific case.

I am enclosing herewith your commission and a duplicate oath form. The oath must be executed and returned within fifteen (15) days after issuance to the Secretary of State's Office, State Capitol Building, Little Rock, Arkansas 72201.

Thank you very much for your willingness to serve in this capacity.

Sincerely,

/s/ Bill Clinton
Bill Clinton

BC:pg

Enclosures

cc: The Honorable Jack Holt, Jr.,
Chief Justice
The Honorable Don Corbin,
Associate Justice
The Honorable Steele Hays,
Associate Justice
The Honorable David Newbern,
Associate Justice
The Honorable Tom Glaze,
Associate Justice
The Honorable Bob Brown,
Associate Justice
The Honorable Robert Dudley,
Associate Justice
Les Steen, Clerk

## APPENDIX D

IN THE SUPREME COURT OF ARKANSAS

FIRST NATIONAL BANK OF CROSSETT, APPELLANT

VS. NO. 91-65

RICHARD E. GRIFFIN APPELLEE

**RESPONSE TO MOTION TO DISQUALIFY AND VACATE OPINION**

(Filed AUG 31, 1992)

For its response to appellee's Motion to Suggest Disqualification and to Vacate Opinion, appellant states:

1. The motion to disqualify should be denied because it was not timely filed. Rule 27, *Rules of Supreme Court*. Griffin has moved that not only Special Chief Justice Robert M. Cearley, Jr. be disqualified, but also that all other members of the court should consider recusing. That motion is not timely under Rule 27. This case was fully briefed and ready for submission to this court on July 10, 1991. The three special justices were appointed in December, 1991, but Griffin did not file his motion to disqualify until August 19, 1992, which was more than eight months after the special justices were appointed, more than four months after the oral argument and six weeks after the opinion was delivered in this case. Griffin, a long time practicing attorney and Chairman of the Board of First State Bank of Crossett, gave no explanation why he waited eight months to file the motion to disqualify. That was more than sufficient time for Griffin and his Little Rock counsel to investigate the background of every member of the court panel. Instead, he conveniently waited until this case was decided so he would

have the opportunity for "two bites at the apple." If the court permits tactics of this nature to prevail, there will be no end to litigation and it will give losing litigants an unfair advantage. It is obvious that Griffin had no interest in requesting Special Chief Justice Cearley, nor any other member of this court, to disqualify until after he had lost this case.

2. The motion to disqualify Special Chief Justice Cearley should be denied because it is based on the rankest of hearsay by a biased person. The motion is based on the affidavit of an employee of Gregory Hopkins, Griffin's attorney. The affidavit is based upon hearsay statements by an unidentified, alleged employee of Arkansas Bankers Association. If an affidavit by a paid employee of counsel of record which is not based on his own personal knowledge but rather on hearsay statements from unidentified sources is sufficient to disqualify a justice and vacate the court's opinion, this court will open Pandora's box to all manner of post-opinion motions by disgruntled litigants.

3. The court should deny the motion to disqualify Special Chief Justice Cearley because, even assuming the allegations in the affidavit are true, the Arkansas Bankers Association is not and has never been a party to this litigation. Likewise, there is not a shred of evidence to establish that the guaranty form in question was prepared by the Arkansas Bankers Association. There is absolutely no evidence to establish that the guaranty form in question was used by a member bank of the Arkansas Bankers Association other than appellant. There is not any evidence that the Arkansas Bankers Association even prepares bank forms.

4. The motion to disqualify should be denied because Griffin's allegation that the Arkansas Bankers Association would be benefited by the court's decision is inaccurate. The obligation of a guarantor under Arkansas law was laid to rest in *Lindell Square, Ltd. Partnership v. Savers Fed. Sav. & Loan Ass'n*, 27 Ark. App. 66, 766 S.W.2d 41 (1989) where the court held that a guarantor's obligation is fixed when debtor defaults. Likewise, this court earlier held in *Moore v. Luxor* (No. Am. Corp.), 294 Ark. 326, 742 S.W.2d 916 (1988) that the holder of a promissory note had no duty to accept an offer of collateral or to repossess the collateral for the protection of a guarantor. Therefore, the court's decision in the present case is neither revolutionary nor startling new precedent in this field.

5. The motion to disqualify Special Chief Justice Cearley should be denied because there is absolutely no showing that Justice Cearley will benefit either directly or indirectly from this decision. Griffin relies upon three cases, *Liljeberg v. Health Service Acquisition Corp.*, 486 U.S. 847 (1988), *Aetna Life Insurance Company v. Lavoie*, 475 U.S. 813 (1985) and *Johnson v. Sturdivant*, 295 Ark. 622, 758 S.W.2d 415 (1988). In all three cases, a sitting justice had a direct relationship with one of the litigants or would personally benefit from the decision of the court because of a pending case where the justice was a litigant. Here, Special Chief Justice Cearley has absolutely no relationship with First National Bank of Crossett, and Griffin has not even suggested that Justice Cearley would personally benefit from this decision. This is nothing more than a bush league tactic to have this case reheard by a different

panel or delay entry of judgment against him on a suit filed in 1987.

6. The motion to disqualify Special Chief Justice Cearley should be denied because the crux of this decision is not based upon use of an "Arkansas Bankers Association form," but rather involves the application of the parol evidence rule to a written guaranty agreement that Griffin himself characterized as "clear and unambiguous and speaks for itself."

7. The motion to disqualify other members of this court without suggesting a valid reason is an affront to this court and reflects a desperate attempt by Griffin to avoid the ultimate judgment against him.

8. The motion to vacate the opinion should be denied because even without Special Chief Justice Cearley's concurrence, the majority of the court has voted to reverse and remand this case to the trial court. Although Griffin relies upon *Johnson v. Sturdivant, supra,* and *Liljeberg v. Health Services Acquisition Corporation, supra,* neither case is in point because in both cases, a sitting justice could have personally benefited from the decision because he was personally involved in litigation with similar legal issues. That is not the case here. Griffin, who has not acted timely, should not be given the unfair advantage of "two bites at the apple."

For the reasons stated above, the motion to disqualify and the motion to vacate should be denied.

Respectfully submitted,

FIRST NATIONAL BANK
OF CROSSETT, ARKANSAS

BY: ARNOLD, HAMILTON
& STREETMAN
Its Attorneys
Post Office Drawer A
Crossett, Arkansas 71635
501/364-2213

PER: /s/ Thomas S. Streetman
THOMAS S. STREETMAN
Arkansas Bar No. 61030

---

## CERTIFICATE OF SERVICE

Thomas S. Streetman, attorney for Appellant, certifies that a copy of the foregoing Response to Motion to Disqualify and Motion to Vacate has been served on Appellee by mailing a copy of same, postage prepaid, to his attorney of record, Mr. Gregory M. Hopkins, 1910 1st Commercial Building, Little Rock, Arkansas 72201, on this 28th day of August, 1992.

/s/ Thomas S. Streetman
THOMAS S. STREETMAN

Supreme Court, U.S.
FILED
JAN 26 1993
OFFICE OF THE CLERK

No. 92-1135

# In The Supreme Court of the United States

October Term 1992

RICHARD E. GRIFFIN,

*Petitioner,*

v.

FIRST NATIONAL BANK OF CROSSETT, CROSSETT, ARKANSAS,

*Respondent.*

**Petition for Writ of Certiorari To The Supreme Court of Arkansas**

## BRIEF IN REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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No. 92-1135

# In The Supreme Court of the United States

October Term 1992

RICHARD E. GRIFFIN,

*Petitioner,*

v.

FIRST NATIONAL BANK OF CROSSETT, CROSSETT, ARKANSAS,

*Respondent.*

**Petition for Writ of Certiorari To The Supreme Court of Arkansas**

## BRIEF IN REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

### INTRODUCTORY STATEMENT

In its Introductory Statement to its Brief, Respondent attacks Petitioner's request for relief contending that the Petitioner's motion for recusal of the justice in question did not occur until after rendition of the June 29, 1992 opinion. Respondent further complains that Petitioner's request for recusal of the justice in question

was based upon an affidavit from an employee of his counsel. Neither of these contentions are relevant to the resolution of this Petition for Certiorari and are classic "red herrings".

Even though Petitioner's request for disqualification of Special Justice Cearley occurred after rendition of the June 29, 1992 opinion, and after the filing of the Petition for Rehearing with Arkansas Supreme Court, the request for disqualification was nevertheless promptly and timely submitted in accordance with Arkansas law. Although Special Associate Justices Miller and Pinson were appointed on October 4, 1991 and Special Chief Justice Cearley was appointed on December 15, 1991, the letters of appointment from then Governor Bill Clinton were not transmitted to counsel for Petitioner at that time. (See Respondent's Appendices A, B, and C, pp. la-6a, especially carbon copy notations.)

Only on April 13, 1992, the date of oral argument before the Arkansas Court, did counsel for Petitioner learn of the appointment of these three special justices. Moreover, there was no disclosure at any time from Special Justice Cearley of his connection with the Arkansas Bankers' Association. Only in August, 1992, did Petitioner learn of the possible connection between Special Justice Cearley and the Arkansas Bankers' Association. Because of the sensitive nature of the incident, Petitioner and his counsel proceeded promptly but cautiously to verify the relationship between Special Justice Cearley, the Arkansas Bankers' Association, and the Respondent herein.

Arkansas procedure does not permit direct contact with supreme court justices under circumstances such

as those present in this matter. Further there is no Arkansas procedure for obtaining information for use in a disqualification proceeding through depositions or other formal proceedings. In this case, Petitioner's only option was to obtain all relevant facts through an informal investigation and present such facts to the Arkansas court in affidavit form.

The law clerk for counsel for Petitioner contacted the Arkansas Bankers' Association and verified the information supporting Petitioner's disqualification request. The law clerk's affidavit, inter alia, established that (1) Special Justice Cearley had served and was at the time of the affidavit serving as adjunct counsel to the Arkansas Bankers' Association; and (2) Respondent was a member of the Arkansas Bankers' Association at that time.

Although Respondent complains at great length as to the procedure followed by Petitioner herein, Respondent does not in any way challenge or controvert the factual basis of Petitioner's request for relief herein. Accordingly, the facts as set forth in the Petition for Writ of Certiorari must be taken as true for purposes of considering Petitioner's request for relief.

## ARGUMENT

### 1. Justice Cearley's participation in the Arkansas appellate proceedings conferred upon him a sufficiently direct, personal, and substantial benefit so as to violate Petitioner's Due Process Rights.

In its Brief in Opposition, Respondent asserts that no constitutional issue is presented by Justice Cearley's participation in this case. Arguing vigorously that neither Justice Cearley nor his client, the Arkansas Bankers' Association, had any direct stake in the litigation between Petitioner and Respondent, Respondent contends that the Due Process Clause is violated only when a judge has a "direct, substantial, pecuniary interest in the outcome." Respondent's Brief, p. 8. (Emphasis supplied.)

Respondent's argument that Justice Cearley lacks a sufficient direct, substantial, and pecuniary interest in this proceeding is an attempt to distort the majority holding in *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813 (1986). Respondent apparently would have this Court hold that *Aetna* allows a judge having direct, personal, and substantial relationship to a case to participate in the rendition of a decision without violating the Due Process Clause so long as the judge has no pecuniary interest in the outcome. Such a holding is clearly inconsistent with *Aetna* (*see*, *e.g.*, 475 U.S. at 829-830) and this Court's subsequent decision in *Liljeberg v. Health Service Acquisition Corp.*, 486 U.S. 847 (1988).

Significantly, *Liljeberg* totally undercuts the argument advanced by Respondent in its brief. In

*Liljeberg*, the district judge who was disqualified was a member of the board of trustees of a university which would be positively or negatively affected by the outcome of the litigation to which the university was not a party. In *Liljeberg*, the Supreme Court held that even where the judge had a lack of knowledge of a disqualifying circumstance or had no direct pecuniary interest in the outcome of the case, he still should not participate in the case where there was a risk that "his impartiality might reasonably be questioned." *Supra* at 859. This result was deemed necessary in order to promote public confidence in the integrity of the judicial process. *Ibid.* at 860. Accordingly, in *Liljeberg*, the judge's lack of a direct pecuniary interest in the litigation did not prevent his disqualification. Thus, *Liljeberg* is factually indistinguishable to the case presented herein and the Petition should be granted.

**2. Even though Justice Cearley did not cast the deciding vote, his participation in the Arkansas appellate proceedings nevertheless violated Petitioner's Due Process Rights.**

Respondent further contends that the Petition should be denied because Justice Cearley voted with the majority in a 5-2 decision. Respondent concludes that since Justice Cearley's vote was not crucial to the decision, no Due Process violation occurred.

Respondent's position is clearly contrary to concurring opinions in *Aetna*, 475 U.S. at 830-33. In his concurring opinion, Justice Brennan states "... I understand that the Court's opinion is not to be read to suggest that the outcome might be different had Justice Embry not provided the necessary fifth vote in the court below.

That fact too is irrelevant — Justice Embry's participation in the court's resolution of the case, while he was fully aware of his interest in the outcome, was sufficient in itself to impugn the decision...." *Ibid.* at 830-831.

Likewise, Justice Blackmun with whom Justice Marshall joined, stated that, "I write separately, however, to stress that the constitutional violation in this case should not depend on the Court's apparent belief that Justice Embry cast the deciding vote — a factual assumption that may be incorrect and, to my mind, should be irrelevant to the Court's analysis. For me, Justice Embry's mere participation in the shared enterprise of appellate decision-making — whether or not he ultimately wrote, or even joined, the Alabama Supreme Court's Opinion — posed an unacceptable danger of subtly distorting the decision-making process." *Ibid.* at 831. As is clearly indicated by the concurring opinions of Justices Brennan and Blackmun, the Due Process Clause is violated where a tainted judge participates in the appellate decision-making process, even where the judge does not necessarily cast the deciding vote.

### 3. Petitioner's request for recusal was timely made in accordance with Arkansas case law.

Respondent finally contends that Petitioner's request for recusal was not timely filed under Rule 27, *Arkansas Rules of Supreme Court*, since it was raised after rendition of the June 29, 1992 Opinion, and after the Petition for Rehearing was filed. This argument ignores both the facts of this case and applicable Arkansas case law.

Respondent argues that Petitioner's Motion to Disqualify should have been filed shortly after the three special justices were appointed in the fall of 1991. This argument is somewhat misleading in light of the fact that neither Petitioner nor his counsel received notice when the three special justices were appointed by then Governor Bill Clinton. (See Respondent's Appendices A, B, and C; Respondent's Brief, pp. 1a-6a, particularly the carbon copy notations.) In fact, counsel for Petitioner was unaware of these appointments until the oral argument was held before the Arkansas Supreme Court on April 13, 1992. At that time there was no opportunity to conduct an investigation of the three special justices, nor was there any reason to believe that grounds for disqualification existed. Further, if grounds for disqualification of Special Justice Cearley did exist (as is now apparent), it was the duty of Special Justice Cearley to disclose these matters to the parties and to disqualify himself. *See Arkansas Code of Judicial Conduct*, Canon 3(D)(1988).

The facts in this case demonstrate that Petitioner has acted diligently. Petitioner only became aware of the facts giving rise to Justice Cearley's disqualification in August, 1992. Thereafter, Petitioner's counsel immediately conducted an investigation and promptly filed his Motion to Suggest Disqualification and to Vacate Opinion on August 24, 1992. Contrary to Respondent's assertions and in light of the facts in this case, it is appropriate under Arkansas case law for a request for recusal to be filed even after the rendition of the opinion. In *Johnson v. Sturdivant*, 295 Ark. 622, 758 S.W.2d 415 (1988), the Arkansas Supreme Court was faced with a similar disqualification motion wherein the basis for the disqualification of a justice was discovered after the

opinion had been rendered. A strict reading of Rule 27 of the *Arkansas Rules of Supreme Court* should have barred this post-opinion request for relief. Nevertheless, after considering the facts of the case, the Arkansas Supreme Court in *Johnson* vacated its previously rendered opinion and all participating justices stepped aside for a reconsideration of the case. *Ibid.* Thus, Petitioner's request for recusal of Special Justice Cearley was timely made consistent with Arkansas law.

## CONCLUSION

The facts and circumstances of this case demonstrate that Petitioner's Due Process rights clearly were violated by the participation of Special Justice Cearley in the Arkansas appellate proceeding. Accordingly, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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